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## PRIVILEGE, MALICE, AND INTENT.

THE law of torts as now administered has worked itself into substantial agreement with a general theory. I should sum up the first part of the theory in a few words, as follows. Actions of tort are brought for temporal damage. The law recognizes temporal damage as an evil which its object is to prevent or to redress, so far as is consistent with paramount considerations to be mentioned. When it is shown that the defendant's act has had temporal damage to the plaintiff for its consequence, the next question is whether that consequence was one which the defendant might have foreseen. If common experience has shown that some such consequence was likely to follow the act under the circumstances known to the actor, he is taken to have acted with notice, and is held liable, unless he escapes upon the special grounds to which I have referred, and which I shall mention in a moment. The standard applied is external, and the words malice, intent and negligence, as used in this connection, refer to an external standard. If the manifest probability of harm is very great, and the harm follows, we say that it is done maliciously or intentionally; if not so great, but still considerable, we say that the harm is done negligently; if there is no apparent danger, we call it mischance.

Furthermore, so far as liability for an act depends upon its probable consequences without more, the liability usually is not affected by the degree of the probability if it is sufficient to give the defendant reasonable warning. In other words, for this



purpose commonly it does not matter whether the act is called malicious or negligent. To make out a *prima facie* case of trespass or libel, if the likelihood of bringing force to bear on the plaintiff's person or of bringing him into contempt goes to the height expressed by the word negligence, as above explained, it need not go higher. There are exceptions, at least in the criminal law. The degree of danger under the known circumstances may make the difference between murder and manslaughter.<sup>1</sup> But the rule is as I have stated. The foregoing general principles I assume not to need further argument.<sup>2</sup>

But the simple test of the degree of manifest danger does not exhaust the theory of torts. In some cases, a man is not liable for a very manifest danger unless he actually intends to do the harm complained of. In some cases, he even may intend to do the harm and yet not have to answer for it; and, as I think, in some cases of this latter sort, at least, actual malice may make him liable when without it he would not have been. In this connection I mean by malice a malevolent motive for action, without reference to any hope of a remoter benefit to oneself to be accomplished by the intended harm to another.<sup>3</sup> The question whether malice in this sense has any effect upon the extent of a defendant's rights and liabilities, has arisen in many forms. It is familiar in regard to the use of land in some way manifestly harmful to a neighbor. It has been suggested, and brought to greater prominence, by boycotts, and other combinations for more or less similar purposes, although in such cases the harm inflicted is only a means, and the end sought to be attained generally is some benefit to the defendant. But before discussing that, I must consider the grounds on which a man escapes liability in the cases referred to, even if his act is not malicious.

It will be noticed that I assume that we have got past the question which is answered by the test of the external standard. There is no dispute that the manifest tendency of the defendant's act is to inflict temporal damage upon the plaintiff. Generally, the result is expected, and often at least it is intended. And the first question that presents itself is why the defendant is not liable without going further. The answer is suggested by the common-

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<sup>1</sup> Bigelow, *Fraud*, 117, n. 3; *Commonwealth v. Pierce*, 138 Mass. 165. Compare *Hanson v. Globe Newspaper Co.*, 159 Mass. 293.

<sup>2</sup> See *The Common Law*, ch. 2, § 3, 4.

<sup>3</sup> See *Rideout v. Knox*, 148 Mass. 368, 373.

place, that the intentional infliction of temporal damage, or the doing of an act manifestly likely to inflict such damage and inflicting it, is actionable if done without just cause.<sup>1</sup> When the defendant escapes, the court is of opinion that he has acted with just cause. There are various justifications. In these instances, the justification is that the defendant is privileged knowingly to inflict the damage complained of.

But whether, and how far, a privilege shall be allowed is a question of policy. Questions of policy are legislative questions, and judges are shy of reasoning from such grounds. Therefore, decisions for or against the privilege, which really can stand only upon such grounds, often are presented as hollow deductions from empty general propositions like *sic utere tuo ut alienum non laedas*, which teaches nothing but a benevolent yearning, or else are put as if they themselves embodied a postulate of the law and admitted of no further deduction, as when it is said that, although there is temporal damage, there is no wrong; whereas, the very thing to be found out is whether there is a wrong or not, and if not, why not.

When the question of policy is faced it will be seen to be one which cannot be answered by generalities, but must be determined by the particular character of the case, even if everybody agrees what the answer should be. I do not try to mention or to generalize all the facts which have to be taken into account; but plainly the worth of the result, or the gain from allowing the act to be done, has to be compared with the loss which it inflicts. Therefore, the conclusion will vary, and will depend on different reasons according to the nature of the affair.

For instance, a man has a right to set up a shop in a small village which can support but one of the kind, although he expects and intends to ruin a deserving widow who is established there already. He has a right to build a house upon his land in such a position as to spoil the view from a far more valuable house hard by. He has a right to give honest answers to inquiries about a servant, although he intends thereby to prevent his getting a place. But the reasons for these several privileges are different. The first rests on the economic postulate that free competition is worth more to society than it costs. The next, upon the fact that a line must be drawn between the conflicting interests of adjoining

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<sup>1</sup> Walker v. Cronin, 107 Mass. 555, 562; Mogul Steamship Co. v. McGregor, 23 Q. B. D. 598, 613, 618.



owners, which necessarily will restrict the freedom of each;<sup>1</sup> upon the unavoidable philistinism which prefers use to beauty when considering the most profitable way of administering the land in the jurisdiction taken as one whole; upon the fact that the defendant does not go outside his own boundary; and upon other reasons to be mentioned in a moment. The third, upon the proposition that the benefit of free access to information, in some cases and within some limits, outweighs the harm to an occasional unfortunate. I do not know whether the principle has been applied in favor of a servant giving a character to a master.

Not only the existence but the extent or degree of the privilege will vary with the case. Some privileges are spoken of as if they were absolute, to borrow the language familiar in cases of slander. For instance, in any common case, apart from statutory exceptions, the right to make changes upon or in a man's land is not affected by the motive with which the changes are made. Were it otherwise, and were the doctrine carried out to its logical conclusion, an expensive warehouse might be pulled down on the finding of a jury that it was maintained maliciously, and thus a large amount of labor might be wasted and lost. Even if the law stopped short of such an extreme, still, as the motives with which the building was maintained might change, the question would be left always in the air. There may be other and better reasons than these and those mentioned before, or the reasons may be insufficient.<sup>2</sup> I am not trying to justify particular doctrines, but to analyze the general method by which the law reaches its decision.

So it has been thought that refusing to keep a man in one's service, if he hired a house of the plaintiff, or dealt with him, was absolutely privileged.<sup>3</sup> Here the balance is struck between the benefit of unfettered freedom to abstain from making that contract, on the one side, and the harm which may be done by the particular use of that freedom, on the other.

It is important to notice that the privilege is not a general one, maliciously to prevent making contracts with the plaintiff, but is attached to the particular means employed. It is a privilege to

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<sup>1</sup> See *Middlesex Company v. McCue*, 149 Mass. 103, 104; *Boston Ferrule Company v. Hills*, 159 Mass. 147, 149, 150.

<sup>2</sup> See 1 *Ames & Smith, Cases on Torts*, 750, n.

<sup>3</sup> *Heywood v. Tillson*, 75 Me. 225; *Payne v. Western & Atlantic R. R.*, 13 Lea, 507. See *Capital & Counties Bank v. Henty*, 7 App. Cas. 741.

abstain from making a certain kind of contract oneself, whether maliciously, in order to prevent others from contracting with the plaintiff, or for a more harmless motive. Still more important it is, and more to the point of this paper, that, in spite of many general expressions to the contrary, the conclusion does not stand on the abstract proposition that malice cannot make a man liable for an act otherwise lawful. It is said that if this were not so a man would be sued for his motives. But the proposition is no more self-evident than that knowledge of the circumstances under which an act is done cannot affect liability, since otherwise a man would be sued for his knowledge, a proposition which is obviously untrue. In a proper sense, the state of a man's consciousness always is material to his liability, and when we are considering the extent of a man's privilege knowingly to inflict pecuniary loss upon his neighbor, it would not be surprising to find that in some cases motives made all the difference in the world. I pass to the inquiry, whether privilege, sometimes at least, is not dependent upon the motives with which the act complained of is done.

Take a case where, as in the last one, the harm complained of is a malicious interference with business, but where the means employed (the act of the defendant) are different. I assume that the harm is recognized by the law as a temporal damage, that not being the object of this discussion. I assume also that the defendant's act is not unlawful or a cause of action unless it is made so by reason of the particular consequence mentioned, and the defendant's attitude toward that consequence. I assume, finally, that the acts or abstinences of third persons induced by the defendant are lawful. If a case could be put where the defendant's act was justified by no grounds of policy more special or other than the general one of letting men do what they want to do, it would present the point which I wish to raise. Such a case I find hard to imagine, but if one should occur, I think courts would say that the benefit of spontaneity was outweighed by the damage which it caused.<sup>1</sup> The gratification of ill-will, being a pleasure, may be called a gain, but the pain on the other side is a loss more important. Otherwise, why allow a recovery for a battery? There is no general

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<sup>1</sup> Possibly, one is suggested by *Keeble v. Hickeringill*, 11 East, 574, n., and *Tarleton v. M'Gawley*, Peake, 205, — we may suppose people to be kept away from the plaintiff by the malicious firing of guns, otherwise lawful. These cases will be found in 1 Ames & Smith, *Cases on Torts*, which contains an excellent selection of decisions bearing on the subject of this article.



policy in favor of allowing a man to do harm to his neighbor for the sole pleasure of doing harm.

But there is no need to stay in such thin air. Let us suppose another case of interference with business by an act which has some special grounds of policy in its favor. Take the case of advice not to employ a certain doctor, given by one in a position of authority. To some extent it is desirable that people should be free to give one another advice. On the other hand, commonly it is not desirable that a man should lose his business. The two advantages run against one another, and a line has to be drawn. So absolute a right of way may not be given to advice as to abstaining from some contracts which have been mentioned. In such a case, probably it would be said that if the advice was believed to be good, and was given for the sake of benefiting the hearers, the defendant would not be answerable. But if it was not believed to be for their benefit, and was given for the sake of hurting the doctor, the doctor would prevail.<sup>1</sup> If the advice was believed to be good, but was volunteered for the sake of doing harm only, courts might differ, but some no doubt would think that the privilege was not made out.<sup>2</sup> What the effect of bad faith without malice would be is outside my subject.

It will be seen that the external standard applied for the purpose of seeing whether the defendant had notice of the probable consequences of his act, has little or nothing to do with the question of privilege. The defendant is assumed to have had notice of the probable consequences of his act, otherwise the question of privilege does not arise. Generally the harm complained of is not only foreseen but intended. If there is no privilege, the difference between notice of consequences and malice is immaterial. If the privilege is absolute, or extends to malicious acts, of course it extends to those which are not so. If the privilege is qualified, the policy in favor of the defendant's freedom generally will be found to be qualified only to the extent of forbidding him to use

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<sup>1</sup> See *Morasse v. Brochu*, 151 Mass. 567; *Tasker v. Stanley*, 153 Mass. 148; *Delz v. Winfree*, 80 Texas, 400, 405. The cases often are obscure as to the precise nature of the act done, which seems to me a most important fact. In *Lumley v. Gye*, 2 El. & Bl. 216, the allegation was that the defendant "enticed and procured" the third person to break the contract. In *Bowen v. Hall*, 6 Q. B. D. 333, the defendant Hall persuaded another to break his contract (pp. 338, 339). In *Old Dominion Steamship Co. v. McKenna*, 30 Fed. Rep. 48, the defendant "procured plaintiff's workmen" to leave their work, and so on.

<sup>2</sup> See *Stevens v. Sampson*, 5 Ex. D. 53.

for the sake of doing harm what is allowed him for the sake of good. Suppose, for instance, advice is given which manifestly tends to injure the plaintiff, but without thinking of him in fact, and that the advice would be privileged unless given in bad faith or maliciously, if expressly directed against the plaintiff. The advice could not be given maliciously as against the plaintiff unless he either was thought of, or was embraced in a class which was thought of.

Perhaps one of the reasons why judges do not like to discuss questions of policy, or to put a decision in terms upon their views as law-makers, is that the moment you leave the path of merely logical deduction you lose the illusion of certainty which makes legal reasoning seem like mathematics. But the certainty is only an illusion, nevertheless. Views of policy are taught by experience of the interests of life. Those interests are fields of battle. Whatever decisions are made must be against the wishes and opinion of one party, and the distinctions on which they go will be distinctions of degree. Even the economic postulate of the benefit of free competition, which I have mentioned above, is denied by an important school.

Let me illustrate further. In England, it is lawful for merchants to combine to offer unprofitably low rates and a rebate to shippers for the purpose of preventing the plaintiff from becoming a competitor, as he has a right to do, and also to impose a forfeiture of the rebate, and to threaten agents with dismissal in case of dealing with him.<sup>1</sup> But it seems to be unlawful for the officer of a trade union to order the members not to work for a man if he supplies goods to the plaintiff, for the purpose of forcing the plaintiff to abstain from doing what he has a right to do.<sup>2</sup>

In the latter case the defendant's act, strictly, was giving an order, not refusing to contract; but perhaps the case would have been decided the same way if the same course had been adopted by unanimous vote of the union.<sup>3</sup> So the right to abstain from contracting is not absolutely privileged as against interference with business. The combination and the intent to injure the plaintiff,

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<sup>1</sup> *Mogul Steamship Company, Limited, v. McGregor*, 1892, App. Cas. 25; 23 Q. B. D. 598. See also *Bowen v. Matheson*, 14 Allen, 499 (1867); *Bohn Manufacturing Company v. Hollis*, 55 N. W. R. 1119 (Minnesota, 1893).

<sup>2</sup> *Temperton v. Russell*, 1893, 1 Q. B. 715.

<sup>3</sup> See *Carew v. Rutherford*, 106 Mass. 1, and the cases below, as to combination. See, also, the further comments toward the end of this article.



without more, do not seem to be the ground. Both those elements were present to an equal degree in the Mogul Steamship Company's case. It is true the jury found malice. But looking at the evidence, the instructions of the judge, and the judgments, evidently they did not mean that the ultimate motive of the defendants was not to benefit themselves. The defendants meant to benefit themselves by making the plaintiff submit, just as, in the other case, the defendants meant to benefit themselves by driving the plaintiff away. It might be said that the defendants were free not to contract, but that they had no right to advise or persuade the contractors who would have dealt with the plaintiff not to do so, and that, by communicating the union's willingness to deal with the contractors, if they would not deal with the plaintiff, the defendants were using such persuasion. But if this refinement is not a roundabout denial of the freedom not to contract, since a man hardly is free in his abstaining unless he can state the terms or conditions upon which he intends to abstain, at all events the same mode of reasoning could be used in the cases where the defendant escapes. The ground of decision really comes down to a proposition of policy of rather a delicate nature concerning the merit of the particular benefit to themselves intended by the defendants, and suggests a doubt whether judges with different economic sympathies might not decide such a case differently when brought face to face with the issue.

Another illustration may be drawn from other cases upon boycotts. Acts which would be privileged if done by one person for a certain purpose may be held unlawful if done for the same purpose in combination.<sup>1</sup> It is easy to see what trouble may be found in distinguishing between the combination of great powers in a single capitalist, not to speak of a corporation, and the other form of combination.<sup>2</sup> It is a question of degree at what point the combination becomes large enough to be wrong, unless the knot is cut by saying that any combination however puny is so. Behind all is the question whether the courts are not flying in

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<sup>1</sup> See *State v. Donaldson*, 32 N. J. L. 151; *State v. Glidden*, 55 Conn. 46; *Crump v. Commonwealth*, 84 Va. 927; *Lucke v. Clothing Cutters' & Trimmers' Assembly No. 7*, 507, K. of L., 26 Atl. R. 505; *Jackson v. Stanfield*, 35 N. E. R. 345 (Indiana, 1894); *Mogul Steamship Company v. McGregor*, 23 Q. B. D. 598, 616; 1892, App. Cas. 25, 45. The cases are not quite unanimous, *Bohn Manufacturing Co. v. Hollis*, 55 N. W. R. 1119 (Minnesota, 1893).

<sup>2</sup> 23 Q. B. D. 617.

the face of the organization of the world which is taking place so fast, and of its inevitable consequences. I make these suggestions, not as criticisms of the decisions, but to call attention to the very serious legislative considerations which have to be weighed. The danger is that such considerations should have their weight in an articulate form as unconscious prejudice or half conscious inclination. To measure them justly needs not only the highest powers of a judge and a training which the practice of the law does not insure, but also a freedom from prepossessions which is very hard to attain. It seems to me desirable that the work should be done with express recognition of its nature. The time has gone by when law is only an unconscious embodiment of the common will. It has become a conscious reaction upon itself of organized society knowingly seeking to determine its own destinies.

To sum up this part of the discussion, when a responsible defendant seeks to escape from liability for an act which he had notice was likely to cause temporal damage to another, and which has caused such damage in fact, he must show a justification. The most important justification is a claim of privilege. In order to pass upon that claim, it is not enough to consider the nature of the damage, and the effect of the act, and to compare them. Often the precise nature of the act and its circumstances must be examined. It is not enough, for instance, to say that the defendant induced the public, or a part of them, not to deal with the plaintiff. We must know how he induced them. If by refusing to let them occupy a building, or to employ them, the answer may be peremptory in his favor, without regard to other circumstances. If by acts wrongful for other reasons, the answer falls outside my subject. If by advice, or combined action not otherwise unlawful, motive may be a fact of the first importance. It is entirely conceivable that motive, in some jurisdictions, should be held to affect all, or nearly all, claims of privilege. The cases which I have cited, by way of illustration, come from different States, and might not be regarded as being so consistent with each other as I have assumed them to be. But in all such cases the ground of decision is policy; and the advantages to the community, on the one side and the other, are the only matters really entitled to be weighed. I only wish to add that thus far, when the act of a third person is nearer to the harm than the act of the defendant, I have assumed the former to be lawful. I have said nothing as



yet of privilege in connection with wrongful acts of others. Also, I have left on one side exceptional cases where the act induced by the defendant would have been a tort or a crime had the third person had his knowledge, for instance, the innocent giving of a poisoned apple. If the harm were of a more serious nature than loss of business, that naturally would narrow the privilege, but it is not likely to be so in the cases which I have had in mind.

I now pass to an entirely different class of cases. In these, intent to produce the harm complained of has an importance of its own, as distinguished from notice of danger on the one side, and from actual malice on the other. To begin at a little distance, one of the difficulties which must occur to every one in thinking of the external standard of liability is: if notice so determined is the general ground, why is not a man who sells fire-arms answerable for assaults committed with pistols bought of him, since he must be taken to know the probability that, sooner or later, some one will buy a pistol of him for some unlawful end? I do not think that the whole answer to such questions is to be found in the doctrine of privilege. Neither do I think that any instruction is to be got from the often-repeated discussions as to cause. It is said that the man whose wrong-doing is nearest to the injury is the only cause of it. But, as is pointed out in *Hayes v. Hyde Park*,<sup>1</sup> a man whose act is nearest to the injury is as much a cause when his act is rightful, as when it is wrongful. Yet an intervening act may not exonerate the defendant.

The principle seems to be pretty well established, in this country at least, that every one has a right to rely upon his fellow-men acting lawfully, and, therefore, is not answerable for himself acting upon the assumption that they will do so, however improbable it may be. There may have been some nibbling at the edges of this rule in strong cases, for instance, where only the slight negligence of a third person intervenes, or where his negligence plays only a subordinate part, but the rule hardly will be disputed. It applies in favor of wrong-doers as well as others. The classical illustration is, that one who slanders another is not liable for the wrongful repetition of the slander without his authority, but the principle is general.<sup>2</sup> If the repetition were privileged, and so rightful,

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<sup>1</sup> 153 Mass. 514.

<sup>2</sup> *Ward v. Weeks*, 7 Bing. 211, 215; *Cuff v. Newark & New York R. R.*, 6 Vroom, 17, 32; *Clifford v. Atlantic Mills*, 146 Mass. 47; *Tasker v. Stanley*, 153 Mass. 148, 150.

and also were manifestly likely to happen, the law might be otherwise.<sup>1</sup>

But the case is different when a defendant has not stopped at the point of saying, I take it for granted that my neighbors will keep to the law, and I shall not let myself be checked in doing what I like, by the danger which there would be, if they acted unlawfully; when, instead, he not only has expected unlawful conduct, but has acted with the intent to bring about consequences which could not happen without the help of such unlawful acts on the part of others. The difference is illustrated by the difference between the general right of a landowner, as against trespassers, to put his land in what condition he likes, and his liability, even to trespassers (without notice), for man-traps or dog-spears. In the latter case, he has contemplated expressly what he would have had a right to assume would not happen, and the harm done stands just as if he had been on the spot and had done it in person. His intent may be said to make him the last wrong-doer.<sup>2</sup>

So when the wrongful act expected is that of a third person, and not of the plaintiff, the defendant may be liable for the consequences of it. There is no doubt, of course, that a man may be liable for the unlawful act of another, civilly as well as criminally, and this now is pretty well agreed when the act is a breach of contract as well as when it is a tort.<sup>3</sup> He is liable, if having authority he commands it; he may be liable if he induces it by persuasion. I do not see that it matters how he knowingly gives the other a motive for unlawful action, whether by fear, fraud, or persuasion, if the motive works. But, in order to take away the protection of his right to rely upon lawful conduct, you must show that he intended to bring about consequences to which that unlawful act was necessary. Ordinarily, this is the same as saying that he must have intended the unlawful act. To sum the matter up in a rule, where it is sought to make a man answerable for damage, and the act of a third person is nearer in time than the defendant's to the harm, if the third person's act was lawful, it stands like the workings of nature, and the question is whether it reasonably was

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<sup>1</sup> *Elmer v. Fessenden*, 151 Mass. 359, 362, and cases cited. See *Hayes v. Hyde Park*, 153 Mass. 514.

<sup>2</sup> *Bird v. Holbrook*, 4 Bing. 628, 641, 642. See *Jordin v. Crump*, 8 M. & W. 782; *Chenery v. Fitchburg R. R.*, 35 N. E. Rep. 554, 555.

<sup>3</sup> *Lumley v. Gye*, 2 El. & Bl. 216; 1 Ames & Smith, Cases on Torts, 600, 612, note by Professor Ames.



to be anticipated or looked out for; but if the third person's act was unlawful, the defendant must be shown to have intended the act, or at least to have expected it, and to have intended consequences which could not happen without the act.<sup>1</sup>

Although actual intention is necessary in this class of cases, malice commonly is not so, except so far as the question of liability for an intervening wrong-doer is complicated with a question of privilege. The damage is assumed to be inflicted unlawfully, since the act of the third person which is nearest to it is assumed to be unlawful. If the defendant has no notice that the third person's act will or may be unlawful, he is free on general principles. But, notwithstanding the reserves of *Bowen v. Hall*,<sup>2</sup> if he knows that the act will be unlawful, it seems plain that persuasion to do it will make him liable as well when not malicious as when malicious. I cannot believe that *bona fide* advice to do an unlawful act to the manifest harm of the plaintiff ought to be any more privileged than such advice, given maliciously, to do a lawful act. Of course, I am speaking of effectual advice. It seems to me hard for the law to recognize a privilege to induce unlawful conduct. But, whether there is such a privilege or not, what I am driving at is, that apart from privilege there is no defence; that is to say, that malice is not material, on any other ground than that of privilege, to liability for the wrongful act of another man.

At this point, then, we have come again upon the question of privilege. When the purpose of the defendant's act is to produce the result complained of by means of illegal acts of third persons, his privilege will be narrower than when he intends to induce only legal acts. As I have said, I do not suppose that the privilege extended to honest persuasion to do harm to the plaintiff by lawful conduct, would extend to similar persuasion to do it by unlawful conduct. Take acts of which the privilege is greater. Could a man refuse to contract with A unless he broke his contract with B? There are cases by respectable courts which look as if he could

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<sup>1</sup> I venture to refer to a series of cases in which my views will be found illustrated. *Hayes v. Hyde Park*, 153 Mass. 514; *Burt v. Advertiser Newspaper Co.*, 154 Mass. 238, 247; *Tasker v. Stanley*, 153 Mass. 148. [Note that, in this case, it did not appear that the conduct advised (the departure of the plaintiff's wife) would have been unlawful in any sense, on the facts assumed as the basis of the advice. It did not appear what those facts were. The question of privilege, therefore, was the main one.] *Elmer v. Fessenden*, 151 Mass. 359, 362; *Clifford v. Atlantic Cotton Mills*, 146 Mass. 47.

<sup>2</sup> 6 Q. B. D. 333, 338.

not.<sup>1</sup> What I have called heretofore the privilege not to contract really is only the negative side of a privilege to make contracts. I stated it in the negative way in order to make the claim of an absolute privilege more plausible. But the right not to contract in a certain event, and to say that you will not, means nothing unless it is implied that you offer a contract, that is, an act on your part, in the other event. If no such offer is understood, then you simply refuse to contract, whatever happens, which undoubtedly you may do. But there is no absolute privilege to make agreements which are not unlawful on their face, that is to say, which do not necessarily and always tend to produce a result that the law wishes to prevent. An agreement may be unlawful, because under the particular circumstances it tends to produce such a result, although in general harmless.

The question has arisen, how close the connection must be between an agreement — for instance, a sale — and the result sought to be prevented, in order to make the sale unlawful. I presume that the same degree of connection which would have that effect would make the seller liable if the result in question was a tort. In *Graves v. Johnson*,<sup>2</sup> where intoxicating liquor was found to have been sold in Massachusetts, "with a view to" an illegal resale by the purchaser in Maine, a majority of the court interpreted the words quoted as meaning that the seller intended that the buyer should resell unlawfully, and was understood by the latter to be acting in aid of that purpose, and held the sale unlawful. But it may be conjectured that the decision would have been different if the seller merely had known of the buyer's intent without encouraging it or caring about it.

In questions of privilege, the nature of the defendant's act, the nature of the consequences, and the closeness of the bond between them, may vary indefinitely. We may imagine the conduct to be of the most highly privileged kind, like the use of land, and to consist of imposing conditions upon the letting of rooms or the removal of a building cutting off a view. We may imagine the conditions to be stated with intent, but without any persuasion or advice, that they should be satisfied, and we may imagine them to be illegal acts anywhere from murder down to breach of a con-

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<sup>1</sup> *Temperton v. Russell* (1893), 1 Q. B. D. 715, mentioned above for a different point. In this case, there was the additional element of combination. See the other cases cited above, p. 8 n.

<sup>2</sup> 156 Mass. 211.



tract to take the *Herald* for a month. Interesting cases of such a kind might be framed for a moot court, although I hardly expect to meet one in practice. But, as I have said, my object is not to decide cases, but to make a little clearer the method to be followed in deciding them.

*Oliver Wendell Holmes, Jr.*

## CONSEQUENCES OF ILLEGAL OR ULTRA VIRES ACQUISITION OF REAL ESTATE BY A CORPORATION.

QUITE a number of cases have arisen in the Courts, in which it has been attempted to question the title of corporations to real estate on the ground of a lack of capacity in the corporation to take and hold the lands in question. In applying to the decision of these cases the rule that the corporate title is not subject to such attack, inasmuch as the question whether the corporation in purchasing has violated a limiting or prohibitory statute, or has exceeded its charter powers, concerns the State alone, the Courts have often added the dictum that lands thus acquired are necessarily subject to escheat by the State. The corporation may take, it is said, and may hold against all but the State, and against the State until divested by a proceeding instituted for that purpose. By a bit of "mediæval reasoning," the case of the corporation is likened to that of the alien, who, at common law, was permitted to take and to hold against all but the sovereign; but, perhaps as Blackstone puts it, on account of his "presumption" in attempting by an act of his own to acquire real property, he was liable at any time to be ousted by the sovereign through the procedure known as an inquest of office. Some text-book writers, relying on this dictum, have assumed it to be the law, and have stated it accordingly.<sup>1</sup>

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<sup>1</sup> Professor Tiedman says that when the amount of property which a corporation may hold is limited, "the State may confiscate whatever lands it acquires above the statutory limit." 5 Amer. and Eng. En. of Law, 431.

Mr. Taylor, speaking of a deed of real estate to a corporation rendered incompetent by its charter or enabling act to hold the real estate conveyed, remarks that "all purposes of public policy are amply subserved by holding the deed voidable at the suit of the government." Taylor on Private Corporations, 303.

Mr. Beach states the law thus: "The Commonwealth alone can object to the legal capacity of a corporation to hold real estate. There must be a direct proceeding by the State for the purpose of vacating the deed." 2 Beach on Corporations, sect. 378.

The author of a recent work on corporations states that when a corporation takes a deed in violation of the local law, the "title is good against all but the State." He refers to this principle as simply a development of the common-law rule applicable to an alien's purchase of real estate. He also says that when a purchase of real estate is made by a foreign corporation, in violation of a local statute, the title will upon proper



The view expressed, either directly or inferentially, in the authorities in question, that corporate realty unlawfully acquired may be seized by the State, was apparently adopted largely in reliance upon some old Pennsylvania cases, which are invariably cited in its support. Upon their examination, however, it appears that they are based on conditions peculiar to Pennsylvania, and not generally existing elsewhere.

The decision in the first of these cases, made in 1821,<sup>1</sup> is placed squarely on the English Mortmain Statutes, under which a corporation might take and hold against all but the mesne lords and the king. A deed to the Bank of North America was collaterally attacked, on the ground that it was taken for a purpose not authorized by the charter of the bank. The Court thought that the title of the corporation was similar to the title of an alien, in that it was good against all but the State; and held that the mortmain laws of England were in force in Pennsylvania to the extent, in the case of a conveyance to a corporation not authorized by its charter or by an Act of the Assembly, of permitting the State as

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*quo warranto* proceedings revert to the State. Murfree on Foreign Corporations, sects. 353, 358.

The Massachusetts Court say: "The corporation by its purchase acquired a title to the land, which was good against all the world, except possibly the Commonwealth." *Davis v. Old Colony R. R.*, 131 Mass. 258.

The Supreme Court of the United States say: "Where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable, and the sovereign alone can object; . . . so an alien forbidden by the local law to acquire real estate, may take and hold title until office found." *Bank v. Whitney*, 103 U. S. 99; *Bank v. Matthews*, 98 U. S. 621.

The Alabama Court say: "The sovereign alone has the right to impeach the transaction, and until it supervenes for this purpose, the corporation is vested with perfect title against all the world, defeasible only upon office found." *Long v. Georgia Pacific R. R.*, 91 Ala. 519.

In North Carolina, the Court hold that a conveyance of land to a railroad corporation, for a purpose other than that authorized by its charter, is, in analogy to a conveyance to an alien at the common law, "valid until assailed in a direct proceeding instituted by the sovereign for that purpose." *Mallett v. Simpson*, 94 N. C. 37.

The Georgia Court say that "foreign corporations seem to have been treated as aliens were in England as to purchasing and holding real estate," and that "the doctrine is thoroughly established in our American States that the right of foreign corporations to purchase or hold lands in excess of the authority conferred, either by their own charter, or by the laws of the State in which such purchase is made, can only be questioned by the State itself in which such land may be situated." *American Mortgage Co. v. Ternille, Ga.* (1891).

See also *De Camp v. Dobbins*, 29 N. J. Eq. 36; *Edwards v. Fairbanks*, 27 La. 449.

In all these cases the statement as to an escheat or forfeiture is mere *obiter*, the question not having been presented or decided.

<sup>1</sup> *Leasure v. Hillegas*, 7 S. & R. 313.

the sovereign lord, there being no mesne lords, to enter and claim the forfeiture, and that until the State did so, the title of the corporation was good, and it could convey such title to its grantee.

In consequence, probably, of this decision, the Pennsylvania Legislature passed an Act, in 1833, to effectuate the law thus declared as to escheat. It provided that lands purchased by a corporation, not authorized thereto by an act of the Legislature, should be subject to forfeiture to the Commonwealth, but that the corporation, its feoffer or feoffers, might hold the same, subject to be divested or dispossessed at any time by the Commonwealth; and prescribed the procedure by which the land should be escheated.

The oft-cited case of *Runyan v. Coster*<sup>1</sup> followed, in 1840, the same point being decided as in *Leasure v. Hillegas*. The case was a Pennsylvania case, which went up from the Circuit Court and the opinion was in accordance with the doctrine of *Leasure v. Hillegas*, and the Statute of 1833. *Goundie v. Northampton Water Co.*,<sup>2</sup> decided in 1847, is to the same effect, and follows the statute referred to.

The only reason why the mortmain laws were considered in force in Pennsylvania was because the charter to Penn was understood as embracing and adopting them. In every other State in the Union in which the question has arisen, it has been judicially held that, founded on the customs of a remote past not applicable to our situation and repugnant to the genius and temper of our laws, they are not in force.<sup>3</sup> They had their origin in feudal reasons and were purely local and English. The ecclesiastical corporations of that country held their powers without written grant, with no precise limitations, and with no limit as to the duration of their existence. At the conclusion of the twelfth century, they enjoyed, in respect of territorial property, nearly one-half of England.<sup>4</sup> The lands thus holden were free from taxes, and, to some extent, from military service; they were also free from such feudal incidents as reliefs, fines, escheats, forfeitures and wardships. The national strength was palsied by the diminution of military nobles; and the feudal superiors were largely deprived of

<sup>1</sup> 14 Peters, 122.

<sup>2</sup> 7 Penn. 233.

<sup>3</sup> 2 Kent's Com. 282; *Potter v. Thornton*, 7 R. I. 252; *Odell v. Odell*, 10 Allen, 1; *Perin v. Carey*, 24 How. (N. Y.) 465; *Page v. Heineberg*, 40 Vt. 81; *Lathrop v. Commercial Bank*, 8 Dana (Ky.), 114; *Rivanna Co. v. Dawsons*, 3 Gratt. (Va.) 19; *Chambers v. St. Louis*, 29 Mo. 543; *Dodge v. Williams* (Wis.), N. W. Rep.

<sup>4</sup> Hallam's Middle Ages, i. 506.



their revenues. It was to remedy all this that alienations in mortmain were prohibited. In this country, corporate realty is subject to the same public burdens as that held by individuals; it may be conveyed voluntarily by the corporation, or taken by force of law for its debts or for public purposes; corporate powers are clearly defined; the period of corporate existence is usually limited; and in all cases, at the present day, the right to repeal, alter, or amend a charter is reserved. In addition to this, we have a territory, vast areas of which are still unoccupied and unimproved.<sup>1</sup> In this country and in this age, it is unreasonable to resort to the mortmain statutes to draw an analogy or to establish the law.

The analogy between the case of the corporation and that of the alien, on which some of the authorities cited rest, seems equally unwarranted. "The escheat of estates to the sovereign," as Judge Redfield puts it,<sup>2</sup> "in consequence of a conveyance to an alien, is a result of purely feudal character. It was so held, because an alien owing a foreign allegiance was regarded as incapable of performing the feudal military services to the king, as lord paramount of all the land in the realm. Hence, the conveyance having carried the title out of the former proprietor, and the grantee being incapable of taking the estate, it was held to vest in the king, absolutely, at the death of the first grantee, as an alien could have no heirs to be invested with his bare possession, which was all the estate which ever existed in him, and which was always liable to be divested at any moment upon office found. None of these reasons exist in this country. The right to interfere with aliens holding real estate in this country goes upon the basis of some defect in allegiance, and allegiance is a matter pertaining altogether to the national sovereignty." A corporation of one State does not occupy in another State the position of an alien.

In the absence of a specific statute, like the Pennsylvania Statute of 1833, it seems very clear that lands acquired and held by a corporation, under the conditions set forth, are not subject to escheat by the State. This conclusion is supported by a late Pennsylvania case. The constitution of that State provides that no corporation doing the business of a common carrier, shall hold or acquire lands, except such as shall be necessary for carrying on its business, but affixes no penalty for a violation. It was accord-

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<sup>1</sup> The unoccupied territory of the State of Texas alone exceeds in area Great Britain.

<sup>2</sup> *State v. Railroad Co.*, 25 Vt. 433.

ingly said, that the Commonwealth may have a remedy, by a proceeding to forfeit the charter of a corporation acquiring or holding lands in violation of this section, but it cannot escheat the lands.<sup>1</sup>

In the absence of such a statute, then, what are the consequences of an illegal or *ultra vires* purchase of real estate by a corporation?

The subject may be considered under three heads.

First. When a corporation, authorized by the law of its creation, for some purposes or to a limited extent, to purchase and hold real estate, takes a deed for other purposes, or beyond the limit allowed.

In such a case, in the absence of any statute to the contrary, it is settled that the deed divests the title of the grantor, and vests it indefeasibly in the corporation. The deed cannot be vacated, but the State chartering the corporation may forfeit its charter for such misuse of its powers. The State alone is concerned, and the State alone can act. In the case of a foreign corporation, the Courts of the State wherein the land in question is situated will take the same view as in the case of a domestic corporation,

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<sup>1</sup> Com. v. R. R. Co., 132 Penn. 591, 596, 605. And now the New York Court of Appeals, in an opinion published after the preparation of this article, holds that the right of the State to object to the holding of land by a foreign corporation does not, without statutory authority, include the right to escheat the land. In this case the defendant, a New Jersey corporation, purchased a lot of land in New York City, and took a deed of the same. Subsequently, the plaintiff and the defendant entered into a written contract whereby they agreed to exchange said lot of land for another lot of land owned by the plaintiff. Pursuant to said contract the defendant executed a deed in due form, by which it assumed to convey the premises to the plaintiff. It was contended that it is contrary to the policy of the State of New York to permit a foreign corporation, chartered to deal in lands, to hold or convey lands in the State. On agreed facts the following question was submitted to the General Term: whether the defendant possessed, and has conveyed to the plaintiff a good and sufficient title to the premises described in said contract and deed. The General Term adjudged that the defendant's deed did not convey to the plaintiff a good title, and that its title was "subject to the right, title, and interest of the people of the State, whose title was, at the time of the execution and delivery of the deed, superior and prior to that of the defendant." On appeal, the Court held that the defendant was not prohibited by any policy of the State from holding or conveying the land in question, and that, if it were otherwise, the right of interference by the State would not extend to any forfeiture of the property held by the corporation. *Lancaster v. Amsterdam Improvement Co.*, 140 N. Y. 576. See also *Walsh v. Barton*, 24 Ohio St. 28. In Minnesota, corporate real estate acquired, held or owned in violation of certain statutory restrictions, is subject to forfeiture to the State, and it is made the duty of the attorney-general to enforce every such forfeiture by due process of law. 2 General Statutes of Minnesota, p. 770. A similar law as to real estate in the Territories may be found in U. S. St., March 3, 1887, ch. 340 (24 St. 476).



regarding the impending danger of a judgment of dissolution as a sufficient check, provided the holding of the land is not contrary to its statutes, or to the policy of its legislation.<sup>1</sup> In case of the dissolution of a business corporation, its real estate is applied to the use of its creditors and stockholders, the old common-law doctrine that it reverts to the grantor being now regarded as "an obsolete wrong."<sup>2</sup>

The rule that an unlawful purchase of land, of the nature stated, concerns the State alone, does not rest on any analogy drawn from the mortmain statutes, or from the case of the alien. It springs from the necessities of modern conditions, and is based on equitable reasons. It would not only create great inconveniences and embarrassments, if corporate titles could in such cases be collaterally impeached, but it would be against justice, and would accomplish a legal wrong, to permit the grantor, and those claiming under him, to raise the question; and as to others, it may be said that the restriction is a matter of governmental policy, which does not concern individuals as such. The wrong done in violating the law is against the State alone; and with the State alone, therefore, should rest the right to elect whether it will assent, or by proper and equitable proceedings interfere and prevent the wrong. "A private person cannot directly or indirectly usurp the functions of the government."<sup>3</sup>

The rule appears to have been first announced in 1820, by Chancellor Kent.<sup>4</sup> It was applied, in 1825, in Virginia;<sup>5</sup> in 1848, in Tennessee;<sup>6</sup> and has since been sustained by a long line of cases.<sup>7</sup>

<sup>1</sup> *Barnes v. Suddard*, 117 Ill. 237; *Gilbert v. Hole*, So. Dakota (1891); *Lancaster v. Improvement Co.*, 140 N. Y. 576.

<sup>2</sup> *People v. O'Brien*, 111 N. Y. 1; *Havemeyer v. Superior Court*, 84 Cal. 327. In the case of a public or charitable corporation, however, its real estate reverts upon its dissolution to the grantor or donor, unless some other course of devolution has been directed by positive law, but still subject, nevertheless, to the charitable use. *Mormon Church v. United States*, 136 U. S. 1, 47.

<sup>3</sup> *Swayne, J., in Bank v. Matthews*, 98 U. S. 628.

<sup>4</sup> *Silver Lake Bank v. North*, 4 Johns. Ch. 370.

<sup>5</sup> *Banks v. Poitiaux*, 3 Rand. 136.

<sup>6</sup> *Barrow v. Turnpike Co.*, 9 Humph. 304.

<sup>7</sup> *Natoma Water Co. v. Clarkin*, 14 Cal. 544; *Hayward v. Davidson*, 41 Ind. 212; *Land v. Coffman*, 50 Mo. 243; *Blunt v. Walker*, 11 Wisc. 334; *So. Pacific R. R. Co. v. Orton*, 6 Saw. 157; *Myers v. Croft*, 13 Wall. 291; *Railroad Co. v. Lewis*, 53 Iowa, 101; *Alexander v. Tolleston Club*, 110 Ill. 65; *De Camp v. Dobbins*, 29 N. J. Eq. 36; *Bank v. Matthews*, 98 U. S. 621; *Colwell v. Springs Co.*, 100 U. S. 55; *Christian Union v. Yount*, 101 U. S. 355; *Bank v. Whitney*, 103 U. S. 99; *Mallet v. Simpson*, 94 N. C. 37; *Baker's case*, 36 Minn. 185; *Land Co. v. Bushnell*, 11 Neb. 192; *Davis v. Old Colony R. R.*, 131 Mass. 258, 273; *Walsh v. Bouton*, 24 Ohio St. 28. See *contra*, *Occum v. Sprague Mfg. Co.*, 34 Conn. 529; *Thweatt v. Bank*, 81 Ky. 1.

On the same principle, it has been held, in the case of an *ultra vires* acquisition of shares of stock by a corporation, that the title of the stock vests in the corporation, and it has the power to sell and dispose of the same.<sup>1</sup>

Second. When a corporation takes a conveyance of land, without complying with statutory requirements made conditions precedent to the right so to do.

The rule here seems to be that unless the legislative intent is manifest, to make the conveyance void for lack of such compliance, it is good. The rule is well illustrated by a recent decision of the United States Supreme Court.<sup>2</sup> In this case, the Court dealt with a statute providing that no corporation, foreign or domestic, should purchase or hold real estate in Colorado, except as therein provided, and imposing, as a penalty upon officers and stockholders, personal liability for the corporate debts. A foreign corporation took a conveyance of land without complying with the requirements of this statute, and its title was questioned in an action of ejectment, by a party claiming under its grantor. The Court, while holding the fair implication to be that the penalty specified was the only result intended by the Legislature to follow a violation of the law, observed that the law does not declare void as to all persons, and for every purpose, a conveyance of real estate to a foreign corporation, which has not previously done what is required, before it can rightfully carry on business in the State, nor that the title to such property shall remain in the grantor, despite his conveyance. If the Legislature had so intended, that intention would have been clearly manifested. The doctrine was also invoked that the State alone can interfere in such a case. The Court, therefore, decided that the deed vested a good title in the corporation. It would seem that the decision might also have been based on the principle that a grantor making title to a corporation is estopped from questioning the effect of his own conveyance.

The same question was passed upon by the Supreme Court of Georgia. It arose under a statute which provides that the State of Georgia will not consent to foreign corporations owning more than 5000 acres of land in that State. The Court held that the State alone could question the right of a corporation to hold land

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<sup>1</sup> H. & G. M. Co. v. H. & W. M. Co., 127 N. Y. 252.

<sup>2</sup> Fritts v. Palmer, 132 U. S. 282.



beyond the limit specified without complying with the requirements of the statute.<sup>1</sup>

Third. When a corporation takes a conveyance of real estate which is directly prohibited by the statutes of the State wherein the land is situated, or contrary to the settled policy of such State.

A conveyance to a corporation in violation of a rule of policy, or of a "positive, peremptory, and forbidding statute," is illegal, as distinguished from a mere *ultra vires* purchase, or a purchase without complying with conditions made prerequisites to such action; but its validity, it is conceived, is ordinarily not to be determined by any different test. In all these cases alike, the fact exists that the conveyance is contrary to law; it is in violation of the expressed or implied will of the Legislature. The violation concerns the individual no more in one case than in the other, and the consequences should be the same; and where the conveyance is questioned by the grantor, or by those claiming under him, the doctrine of estoppel is equally applicable. Although the law does forbid the conveyance, if the fact exists that the conveyance has been made, notwithstanding the prohibition, it does not, by any means, follow as an invariable consequence, that the conveyance is utterly inoperative. The law may prohibit the doing of an act, and yet if it is done, the act may stand. For example, property conveyed pursuant to a contract made in consideration of the compounding of a crime, cannot be recovered back at law, nor the conveyance set aside in equity.<sup>2</sup> So, of a lease of a railroad, *ultra vires* of lessor and lessee, a bill by the lessor to set aside the lease will not be entertained, when the lessee has taken no steps to rescind or repudiate the contract.<sup>3</sup>

In such cases, the parties being equally at fault, the Courts decline to interfere, and the executed contracts of the parties stand. When a sale has been executed, the vendor cannot impeach his conveyance by showing its illegality, and thus change the title. This disability on his part avails the vendee as a sufficient title.<sup>4</sup> Therefore, even if a conveyance to a corporation is contrary to law, it does not necessarily follow that the property is to revert to the grantor, who has been fully paid for it, or to become the spoil of the first taker.

<sup>1</sup> American Mortgage Co. v. Tennille, Georgia (1891), 33 Amer. & En. Corp. Cases, 37.

<sup>2</sup> Atwood v. Fisk, 101 Mass. 363; Bryant v. Peck Co., 154 Mass. 460.

<sup>3</sup> St. Louis R. R. v. Terre Haute R. R., 145 U. S. 394.

<sup>4</sup> Ellis v. Hammond, 57 Ga. 179; Hill v. Freeman, 73 Ala. 200, 201; Meyers v. Meinrath, 101 Mass. 366; Horton v. Buffington, 105 Mass. 399.

But the transfer of the title to real estate is governed by the law of the State in which the land is situated. The right of corporations to hold real estate is wholly within the control of legislative action; it may be limited or absolutely prohibited; and the consequences of a violation of a limiting or prohibitory law may be legislatively fixed. Whether or not, then, a conveyance of real estate to a corporation, which is in violation of the *rex rei sitæ*, is wholly void as to all persons and for every purpose, the title to the property remaining in the grantor despite his conveyance, must depend upon the legislative intent to be drawn from the language of the statute itself.

The difficulty seems to be in determining the controlling principle or rule to be applied in the construction of such a law. The only proposition, it has been said, upon which all the authorities agree, is the elementary one that the law should be given such effect as the Legislature intended; but there is an irreconcilable conflict in the cases, which have arisen under prohibitory statutes of various kinds as to the true criterion of the legislative intent. In some cases, it is urged that when there is a mere prohibition without a penalty, the Legislature must have intended that the prohibited act should be void, as otherwise there would be no penalty, and the law would be simply "an expression of legislative opinion, without means for its enforcement." In other cases, it is held that a mere prohibition does not make the prohibited act void. In some cases, the fact that a penalty is specified is regarded as establishing the "severely prohibitory character of the law," and as making the act void. In still another class of cases, the presence of a penalty is taken to mean that the Legislature intended that it should be the sole consequence of the violation of the law. In the case, however, of a purchase of real estate by a corporation, in violation of a prohibitory statute, peculiar conditions are presented, which would seem to establish it as the best rule that, in the absence of a declaration that the conveyance shall be void, or that the title shall remain in the grantor, or of some other provision of a similar nature, the question cannot be collaterally raised by third persons, or by the grantor or those claiming under him.

The case of an illegal purchase of real estate by a corporation is to be distinguished from that class of cases in which it is necessary to hold acts done in violation of law void, because to hold otherwise would render the law nugatory, there being no other way to enforce it. In the case of a prohibited purchase of real estate by a



corporation, it is not necessary to hold the deed void, in order to accomplish the end sought to be attained, namely, to prevent the corporation from carrying on a business in a State, in violation of the settled policy of that State. This end may be reached by a more equitable process. It is not necessary to perpetrate the iniquity of allowing a party to recover or transmit title to property, which he has voluntarily conveyed for a full consideration, without returning that consideration. It is not necessary, by declaring a deed void, to restrict a grantor in his choice of an alienee, that is, in his right of alienation, thereby also creating the absurdity that the title still remains in the alienor, in spite of his own will and contract. And finally, it is not necessary to compel innocent stockholders, though guilty of no wrong or fault, to lose both the property purchased and the price paid. The proper officers of the State, by *quo warranto*, or other appropriate process, may proceed against the offending corporation to oust it from the exercise of its franchises in the State, and to have a receiver appointed to sell the lands improperly held by it, applying the proceeds for the benefit of stockholders and creditors. The cases seem to establish the authority for such procedure.<sup>1</sup>

In construing a prohibitory statute or in applying a rule of policy in any one of the cases cited, the Courts should, if possible, protect and preserve the rights of innocent stockholders. Each stockholder of a business corporation contributes his share of the capital for the common benefit of all, and the corporation itself holds the corporate property as a trustee for the shareholders.<sup>2</sup> The corporate entity, therefore, being regarded as the trustee of the stockholders, it would seem that a disability on the part of the corporation to take should not destroy the rights of the beneficial owners, assuming always of course that the law itself does not explicitly so declare. Thus, where the officers of a savings-bank invest its funds in a manner forbidden by statute, such illegal action of the officers does not impair the validity of the investment; and the remedy, either of the trustee or of the *cestuis que trust*, in availing themselves of the security so improperly taken, is not affected.<sup>3</sup> This principle was applied in *Insurance Company v.*

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<sup>1</sup> *Havemeyer v. Superior Court*, 84 Cal. 327; s. c. 18 Amer. St. Reports, 192, 211; *Wright v. Lee*, So. Dakota, 51 N. W. Rep. 706; 55 Id. 931; *State v. Fidelity Co.*, 39 Minn. 538; *State v. Insurance Co.*, 47 Ohio State, 167.

<sup>2</sup> Morawetz on Corporations, sects. 237, 1032; Ch. J. Doe, on the Dartmouth College Case, 6 Harvard Law Review, p. 172; *Taylor v. Miami Co.*, 5 Ohio, 162.

<sup>3</sup> *Holden v. Upton*, 134 Mass. 177; *Great Eastern R. R. v. Turner*, L. R. 8 Ch. 149.

Harbor Protection Company,<sup>1</sup> a case in which certain corporations had attempted to form a corporation under the general laws, without right, and the supposed new corporation had acquired property. It was held that this property belonged to the holders of certificates of stock, and that the Court would order it to be sold and the proceeds divided among them.

The question under discussion has been decided by a Court of last resort, contrary to the doctrine contended for, in but one case, so far as the writer is informed. In a case decided some years ago in Illinois,<sup>2</sup> it is held that a conveyance of land to a foreign corporation, not expressly prohibited by statute, but opposed to the settled policy of the State in which the land is situated, is void; that the corporation takes no title, and is unable to transmit any. In this case, a Connecticut land company had purchased real estate in Illinois, which it subsequently sold and conveyed to the city of St. Louis. The plaintiff, who claimed under the grantor of the land company, brought a suit of ejectment against the city. The Court, by reference to the general course of legislation on the subject, declared it to be against the policy of Illinois to permit a corporation of another State, formed for the sole purpose of buying and selling real estate, to purchase and hold lands in Illinois. The result stated was put on the ground that a corporation created in one State cannot exercise its functions in another State, without the permission of the latter, it being assumed, without reasoning, that a deed to a corporation acting without such consent is necessarily inoperative. Two of the judges, however, dissented from the opinion so far as it held invalid a transfer of land by the corporation to a purchaser.

The cases the other way may be briefly referred to. In a Louisiana case,<sup>3</sup> a corporation had made an *ultra vires* purchase of certain machinery, which was subsequently seized on execution by a creditor of the vendor. The Court said: "If the Company did anything contrary to law, the result might be a forfeiture of its charter. But we do not understand the law to be that if a corporation acquires property in a manner even *prohibited by law*, the property thus acquired still belongs to the vendor who has received his price, and that it can be seized to pay his debts."

In the recent case of *Carlow v. Aultman*,<sup>4</sup> the defendant corporation purchased land in Nebraska, in violation of a statute

<sup>1</sup> 37 Louisiana Annual Reports, 233.

<sup>3</sup> *Edwards v. Fairbanks*, 27 La. Ann. 449.

<sup>2</sup> *Carroll v. East St. Louis*, 67 Ill. 568.

<sup>4</sup> *Nebraska* (1890), 44 N. W. Rep. 873.



providing that "no corporation or association not incorporated under the laws of this State shall acquire or own, hold or possess by right, title, or descent accruing hereafter, any real estate in the State of Nebraska." The Court held, nevertheless, that the title vested in the corporation, and that it could be questioned by the State alone.

Another late decision to the same effect is *Fisk v. Patton*, Utah Supreme Court, 1891.<sup>1</sup> The statute of Utah under consideration in this case provides that "a corporation shall not have power to enter into, as a business, the buying and selling of real estate."

The Court say: "It will be observed that this statute, while it denies to a corporation the power to engage in buying and selling real estate as a business, affixes no penalty, by forfeiture or otherwise, for its violation. The buying and selling of real estate by a corporation is not a crime under this statute, nor is the business an immoral one, and while a stockholder might by proper proceedings prevent a corporation from engaging or continuing in the business of buying and selling real estate, we do not think that the corporation forfeits its title to real estate bought in violation of the statute."<sup>2</sup>

And in the latest case on the subject, the New York Court of Appeals held that the question whether it is contrary to the policy of that State to permit a foreign corporation to take, hold, or convey land in the State is between the corporation and the government, and is not open to others.<sup>3</sup>

In conclusion, it may be well to note that the case of a devise to a corporation, under any of the conditions stated, is, when the heir of the devisor is the party complaining, distinguishable from the case of a conveyance. Here the rule contended for does not apply, because the will under which the devise is made does not take effect until the testator's death, and then, if his property is not legally devised, no title rests for a single moment in the devisee, but it vests instantly in the heir-at-law or next of kin, who accordingly have a standing in Court to raise the question of the capacity of the corporation to take.<sup>4</sup>

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TAUNTON, MASS.

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<sup>1</sup> 36 Amer. & Eng. Corp. Cases, 669.

<sup>2</sup> See also *Gilbert v. Hole*, So. Dakota (1891), 36 Amer. & Eng. Corp. Cases, 664.

<sup>3</sup> *Lancaster v. Amsterdam Improvement Co.*, 140 N. Y. 576, 586.

<sup>4</sup> *In re McGraw's Estate*, 111 N. Y. 66; *Trustees of Davidson College v. Chambers's Executors*, 3 Jones Equity (N. C.) 253; *Wood v. Hammond*, 16 R. I. 98.

## SUCCESSIVE PROMISES OF THE SAME PERFORMANCE.

SOME difference of opinion and judicial decision has existed in regard to the possibility of the same promise or performance, serving as consideration for successive promises, and an examination of the question has the indirect value of testing the adequacy of received definitions of consideration. The cases may be divided into two classes, *first*, where the successive promises are made by the same party; *second*, where they are made by different parties.

### I.

A frequent and convenient illustration of the first class arises where a builder engages to build a house in consideration of a promise by the owner of the land to make specified payments. Subsequently, the builder, finding his contract will prove unprofitable, informs the landowner that unless additional compensation is promised, work on the building will cease. Thereupon the landowner says, that if the builder will build the house, or agree to do so, further payment will be made. The house is accordingly built, and the landowner then refuses to pay more than the amount originally agreed upon.

The obvious objection to the second agreement, whether unilateral or bilateral in form, is, that as the builder was already bound to build the house, he suffers no detriment in building it or in repeating his promise to build it, and the landowner receives no benefit to which he was not previously entitled. Nevertheless, many decisions in this country have held such a second agreement constitutes a valid contract, and the objection just mentioned has been met, either by the statement that the second agreement was evidence of a rescission of the earlier contract, or by the argument that the prior contract would not have been performed, and though the non-performance would have subjected the promisor to liability to pay damages, his actual performance might be a greater benefit to the other party than a right of action.



The earliest cases involving the point are two English *nisi prius* decisions.<sup>1</sup> In those cases seamen had refused to work as they had agreed to do, by shipping articles, unless they were promised additional wages, and such a promise having been made, action was subsequently brought for breach of it. It was held that the seamen could recover only the wages which were originally agreed upon. In the first case, the decision was based on the ground that the second agreement was contrary to public policy. But in *Stilk v. Myrick*, Lord Ellenborough, while approving the earlier decision, doubted whether public policy was the true principle on which the decision was to be supported. "There was no consideration for the ulterior pay promised to the mariners who remained with the ship. Before they sailed from London, they had undertaken to do all they could under all the emergencies of the voyage. . . . Therefore, without looking to the policy of this agreement, I think it is void for want of consideration." Since these decisions, it does not seem to have been doubted in England that neither the promise to do a thing, nor the actual doing of it, will be a good consideration if it is a thing which the party is already bound to do by contract with the other party. The early decisions have been followed in later cases presenting the same facts.<sup>2</sup> No other cases seem to have arisen in England, as they have in this country, where the earlier obligation grew out of a bilateral obligation, subsisting at the time of the second agreement to do something other than pay money. And only in such a case is it possible to reason, that the earlier obligation has been rescinded by mutual consent,<sup>3</sup> but, from the language used by English cases and text-writers, and the decisions already referred to, it is fair to suppose that unless clear evidence of a rescission of the earlier contract was presented the subsequent agreement would be held *nudum pactum*.<sup>4</sup> And the making of the subsequent agreement in order to avoid a breach of the earlier, would not be regarded as such evidence.<sup>5</sup>

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<sup>1</sup> *Harris v. Watson*, Peake, 72; *Stilk v. Myrick*, 2 Camp. 317.

<sup>2</sup> *Frazer v. Hatton*, 2 C. B. N. s. 512; *Harris v. Carter*, 3 E. & B. 559.

<sup>3</sup> A debt or other unilateral obligation cannot be extinguished by parol agreement. See *infra*, p. 35, note 2.

<sup>4</sup> See *Bayley v. Homan*, 3 Bing. N. C. 915; *Jackson v. Cobbin*, 8 M. & W. 790; *Willis v. Peckham*, 1 Br. & B. 515; *Crowhurst v. Laverack*, 8 Ex. 208; *Mallalieu v. Hodgson*, 16 Q. B. 689; *Leake on Contracts* (3d ed.), 538, 539; *Pollock on Cont.* (4th ed.) 176.

<sup>5</sup> *Harris v. Carter*, 3 E. & B. 559.

A few years after the decision of *Stilk v. Myrick*, a similar case arose in the highest court of New York,<sup>1</sup> and the court, after stating that the enforcement of the agreement to pay higher wages was contrary to public policy, stated, as another ground of decision: "The promise to give higher wages is void for the want of consideration. The seamen had no right to abandon the ship at Beaufort, and a promise to pay them an extra price for abstaining from doing an illegal act was a *nudum pactum*."

Oddly enough, in the same volume of reports is contained the case which has served in large part as the foundation for the doctrine that a second agreement, made after refusal to perform a prior one, is binding.<sup>2</sup> In *Lattimore v. Harsen*, the plaintiffs and defendant had entered into a written contract by which the plaintiffs agreed, under a penalty of \$250, to open a cartway for \$900. After some part of the work was done, the plaintiffs became dissatisfied with their contract and determined to abandon it. The defendant then agreed that if they would go on and complete the work, he would pay them by the day without reference to the written contract. The court allowed the plaintiffs to recover under the second agreement, and said, "By the former contract, the plaintiffs subjected themselves to a certain penalty for the non-fulfilment, and if they chose to incur this penalty, they had a right to do so, and notice of such intention was given to the defendant, upon which he entered into the new arrangement. Here was a sufficient consideration for this promise." *Bartlett v. Wyman* was not cited. In Massachusetts, a few years later, a similar question arose in regard to a building contract, and in that case also the plaintiff was allowed to recover;<sup>3</sup> the court saying that "the first contract was waived." These cases have since been followed, not only in New York<sup>4</sup> and Massachusetts,<sup>5</sup> but in several other States.<sup>6</sup> Sometimes, as in *Bishop v. Busse*,<sup>7</sup> the decision of the court is rested on the assertion that the promisor

<sup>1</sup> *Bartlett v. Wyman*, 14 Johns. 260.

<sup>2</sup> *Lattimore v. Harsen*, 14 Johns. 330.

<sup>3</sup> *Munroe v. Perkins*, 9 Pick. 298.

<sup>4</sup> *Stewart v. Keteltas*, 36 N. Y. 388.

<sup>5</sup> *Holmes v. Doane*, 9 Cush. 135; *Rollins v. Marsh*, 128 Mass. 116; *Rogers v. Rogers*, 139 Mass. 440; *Thomas v. Barnes*, 156 Mass. 581, 584.

<sup>6</sup> *Stoudenmeier v. Williamson*, 29 Ala. 558; *Bishop v. Busse*, 69 Ill. 403; *Cooke v. Murphy*, 70 Ill. 96; *Coyner v. Lynde*, 10 Ind. 282; *Moore v. Detroit Locomotive Works*, 14 Mich. 266; *Goebel v. Linn*, 47 Mich. 489; *Conkling v. Tuttle*, 52 Mich. 130; *Osborne v. O'Reilly*, 42 N. J. Eq. 467; *Lawrence v. Davey*, 28 Vt. 264.

<sup>7</sup> 69 Ill. 403.



probably considered the right to recover damages for breach of the prior contract of less advantage than actual performance of the promise, and this advantage to the promisor, is, it is said, sufficient consideration to support the second promise. In other cases, as in the Massachusetts decisions, a rescission of the earlier contract is relied on. Neither reason will support the decisions. Granting that a benefit or advantage moving from the promisee to the promisor is a good consideration, surely nothing can be regarded by the law as a benefit to the promisor unless it is something more than what he was already entitled to. The cases, therefore, demand the further assumption that, on breach of the original contract or on the announcement that it was about to be broken, the only thing to which the other party was entitled was a right of action for damages. If this be granted, it is obvious, that the substitution of performance, or a promise of performance, of the original contract for such a right of action affords ample consideration for a promise. But this cannot be granted. It is doubtless true that a promisor can always refuse to perform his promises, and in most cases the only liability he incurs thereby is to pay damages, but this is far from saying that when one enters into a contract he in effect agrees to perform or pay damages at his option. His duty is to perform the contract, and his co-contractor is entitled to the performance.<sup>1</sup> If the duty is not performed, the only relief the law can generally give is an award of money damages; but the inadequacy of a legal remedy to the plaintiff's right is not peculiar to the law of contracts. It would be an odd statement of the law to say that one who takes another's property, believing it to be his own, has a right to retain it on paying its value, and that the owner has no right to the property, but only to a right of action of damages. Yet, in such a case also, an award of money-damages equal to the value of the property is generally the owner's only relief. Probably no court would sustain a promise made in consideration of the surrender of converted property to its owner,<sup>2</sup> yet the promisor certainly may derive a benefit from

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<sup>1</sup> This is illustrated by the cases in equity which hold that a contract if of such a nature as to be enforceable in equity will be specifically enforced, though the contract provides that in case of breach the damages shall be liquidated at a specified amount. The defendant has no right to pay the damages and claim exemption from his promise. See Fry on Specific Performance, chap. iii.

<sup>2</sup> See *Cowper v. Green*, 7 M. & W. 633; *McCaleb v. Price*, 12 Ala. 753; *Crosby v. Wood*, 6 N. Y. 369; *Jones v. Miller*, 12 Mo. 408; *Cleveland v. Lenze*, 27 Ohio St. 383.

the surrender which he might not otherwise obtain. But here, as in the general class of cases under consideration, it is a benefit to which he has a right, whether the right is, or is not, adequately enforceable.

The rescission of the prior contract may seem a more plausible ground to rest the decisions on; and it must be admitted, at the outset, that a rescission of one contract and the substitution for it of another in regard to the same subject-matter is not only possible, but is in fact very common. But a narrower question than that is presented, namely: Is the refusal of a contractor to perform his contract, and the subsequent promise by the other party of greater compensation than the original contract provided for, in order to induce performance, evidence sufficient to justify a court or a jury in finding that a rescission has in fact taken place? It is submitted that it is not, that no intention is shown to release the contractor from his promise, but rather something additional is promised him to induce him to perform it.<sup>1</sup> Further, it may well be doubted whether a refusal to go on with a half-performed contract unless further compensation is given is not such compulsion as might justify a recovery of money actually paid,<sup>2</sup> and *a fortiori* invalidate a promise secured by such means. Take, for instance, the case of *Goebel v. Linn*.<sup>3</sup> There, the defendants, brewers, had made a contract for ice for a year, at two dollars a ton. In the spring, the ice company notified the defendants that they should no longer deliver ice at the contract price. One of the defendants testified without contradiction that no ice could be procured of other parties at the time, that shortly before the company's refusal ice was obtainable, and that this was called to the attention of the manager of the company, but that he said the company would fulfil its contract. Failure to obtain ice would have involved a direct loss of stock on hand valued at \$15,000, and an indirect loss of business. Under these circumstances the defendant agreed to pay three dollars and a half a ton, and gave notes for ice received at that rate, on one of which the action was based. The defendant was held liable. Cooley, J., who delivered the opinion of the court, seems to rest the decision on the fact that it was an advantage to the defendants to make a new arrangement rather than sue for damages, and the facts he said did not show duress. This seems

<sup>1</sup> See *Harris v. Carter*, 3 E. & B. 559.

<sup>2</sup> See Keener on Quasi Contracts, chap. xi.

<sup>3</sup> 47 Mich. 489.



a very harsh decision.<sup>1</sup> In *Endriss v. Belle Isle Co.*,<sup>2</sup> where the facts were similar, the brewer, having paid for ice received, according to the second agreement, brought an action for damages for breach of the original contract, and was held entitled to submit to the jury the question whether that contract was rescinded. It is hard to reconcile this with the preceding case,<sup>3</sup> which seems necessarily to treat the prior contract as rescinded. Otherwise, there was no value given or received for the note, and besides the circuitry of action which would result from allowing a recovery in both actions should have been a sufficient reason for a different decision in an action on the second contract.

If excuse is needed for saying so much, it is to be found in the fact that the cases criticised, though contrary, it is believed, to the law of England, and to general principles universally admitted, perhaps represent, on the exact point which they cover, the weight of American authority. There are, however, decisions to the contrary. In *Ayres v. Chicago, Rock Island & Pac. R. R. Co.*,<sup>4</sup> it was held that a promise to pay additional compensation to a railroad contractor, upon his refusal to comply with a contract to construct a railroad, was void. Decisions to the same effect have been made in a few other cases,<sup>5</sup> and in Illinois and Michigan late decisions make it probable that the earlier cases referred to above would not be followed to their full extent.<sup>6</sup>

## II.

Turning now to the second class of cases of which it was proposed to treat, we find curiously enough that in England performance or promise of performance of something which one was at the time bound to perform by contract with a third person is held a sufficient consideration, while in this country the contrary is held almost universally, though, in many jurisdictions, as just shown, a previous contract between the same parties does not

<sup>1</sup> It is criticised in *Lingenfelder v. The Wainwright Brewing Co.*, 103 Mo. 578, 594.

<sup>2</sup> 49 Mich. 279.

<sup>3</sup> *Rogers v. Rogers*, 139 Mass. 440, is a contrary decision.

<sup>4</sup> 52 Iowa, 478.

<sup>5</sup> *McCarty v. Hampton Assoc.*, 61 Iowa, 287; *Lingenfelder v. The Wainwright Brewing Co.*, 103 Mo. 578; *Festerman v. Parker*, 10 Ired. 474; *Erb v. Brown*, 69 Pa. 216. See also *Proctor v. Keith*, 12 B. Mon. 252; *Eblin v. Miller's Exec.*, 78 Ky. 371; *Conover v. Stillwell*, 34 N. J. L. 54, 57.

<sup>6</sup> *Nelson v. Pickwick Associated Co.*, Ill. 30 App. 333; *Golds Borough v. Gable*, 140 Ill. 269; *Widiman v. Brown*, 83 Mich. 241.

invalidate the second agreement. The well-known cases of *Shadwell v. Shadwell*,<sup>1</sup> and *Scotson v. Pegg*,<sup>2</sup> establish the English law.<sup>3</sup> In both cases the second contract was unilateral, actual performance of the earlier obligation being the sole consideration of the promise sued on. The cases seem to be rested on the ground that the performance was a benefit to the defendant, and it is on this ground alone that they can be rested. This is the only class of cases where it is possible for the promisor to receive a benefit to which he was not previously entitled, moving from the promisee, and yet the promisee suffer no detriment. The promisor has certainly received something to which he was not entitled, but the promisee has done nothing which he was bound not to do. If the ordinarily received definition of consideration is accurate — that it is some detriment to the plaintiff *or* some benefit to the defendant moving from the plaintiff — these decisions are sound. The definition, however, it need hardly be said, originally had no reference to this class of cases. It is a statement of the past history of consideration, rather than of the present doctrine. No doubt, during its development consideration meant something more or different than something given by the promisee in exchange for the promise, but that is the end to which it gradually tended, and which it may now be held to have reached.<sup>4</sup> This definition makes what the promisee gives — that is, the detriment<sup>5</sup> suffered by him — the universal test of the sufficiency of consideration, and by this test, as the promisee has given nothing which he was not already bound to give, the promise is not binding. If it be argued that judges have said that consideration may be either a benefit or a detriment so many times that it is now law, the answer is that they have also said a great many times that doing what one is bound to do is not a good consideration, and both these propositions cannot be true. The American cases hereafter cited, which not only lay

<sup>1</sup> 30 L. J. C. P. 145. Cited with approval in *Pegge v. Lampeter Union*, L. R. 7 C. P. 366, 371.

<sup>2</sup> 6 H. & N. 295.

<sup>3</sup> *Jones v. Waite*, 5 Bing. N. C. 341, a decision of the Exchequer Chamber (affirmed in the House of Lords, 9 Cl. & F. 101), seems not to have been cited or considered in *Shadwell v. Shadwell* and *Scotson v. Pegg*. Although that decision turned on a different point, the language and reasoning of several of the judges is clear authority that the second agreement is invalid.

<sup>4</sup> Langdell, Summary, § 64; Pollock on Contracts, chap. iv.

<sup>5</sup> Detriment is used in a broad sense. It is intended to include doing or refraining from doing anything whatever, when the promisee had the right to adopt a contrary course.



down the general rule that doing what one is bound to do is not a good consideration, but apply it to this class of cases, therefore carry out to its logical conclusion the doctrine of consideration, in making the test what the promisee has given, not what the promisor has received.

Conceding most of this argument, an attempt has been made by some to distinguish unilateral and bilateral agreements. In Professor Langdell's *Summary of the Law of Contracts*,<sup>1</sup> it is said: "It will sometimes happen that a promise to do a thing will be a sufficient consideration when actually doing it would not be. Thus, mutual promises will be binding though the promise on one side be merely to do a thing which the promisee is already bound to a third person to do, and the actual doing of which would not, therefore, be a sufficient consideration. The reason of this distinction is, that a person does not, in legal contemplation, incur any detriment by doing a thing which he was previously bound to do, but he does incur a detriment by giving another person the right to compel him to do it, or the right to recover damages against him for not doing it. One obligation is a less burden than two (*i. e.* one to each of two persons), though each be to do the same thing." The same distinction is also involved in the discussion of the subject by Sir Frederick Pollock, in the first edition of his treatise on the law of contracts.<sup>2</sup> Sir William Anson, however, pointed out a fallacy in this line of reasoning,<sup>3</sup> in that it assumes that the second promise does impose an obligation upon the promisor. As both parties to a bilateral contract are bound or neither is bound, this assumption involves the further assumption that the second promise is itself a sufficient consideration to support the counter-promise, — the very point in dispute. Anson then suggests another line of reasoning to sustain the second agreement.<sup>4</sup> "The case may however be put in this way; that an executory contract may always be discharged by agreement between the parties; that A and M, parties to such an agreement, may thus put an end to it at any time by mutual consent; that if X says to A, 'Do not exercise this power, insist on the performance by M of his agreement with you, and I will give you so and so,' the carrying out by A of his agreement, or his promise to do so, would be a consideration for a promise by X. A in fact agrees to abandon a right which he might have exercised in concurrence with M, and this, as we have seen, has always

<sup>1</sup> Sect. 84.

<sup>2</sup> Pollock, *Contracts* (1st ed.), 158.

<sup>3</sup> Anson, *Contracts* (1st ed.), 80.

<sup>4</sup> Page 87.

been held to be consideration for a promise." This reasoning is adopted by Pollock in the later editions of his treatise.<sup>1</sup>

It seems impossible to dispute Anson's criticism of the theory advanced by Pollock and Professor Langdell, but it has not been always observed that the same criticism may be made in the case of every bilateral contract if the test of the sufficiency of consideration is defined, as it usually is, as a benefit conferred upon the promisor or a detriment suffered by the promisee. To enter into a binding obligation to do or not to do anything whatever is always a detriment, and on the other hand, unless a promise imposes an obligation, no promise whatever can be considered a detriment. It is, therefore, assuming the point in issue to say a promise is a detriment because it is binding. There are but two ways out of the difficulty. The first is to say that for the purpose of testing the sufficiency of consideration the law assumes that the promise is binding, or, in other words, mutual promises, unless merely repetitions of previous obligations to the same person, are always sufficient consideration for each other. The other way is to revise slightly the test of consideration in a bilateral contract, seeking the detriment necessary to support a counter-promise, in the thing promised, and not in the promise itself. If the first way is adopted, the result is that not only is a promise to do something which the promisor is then bound by contract with a third person to do, a good consideration, but so also is a promise to receive a pure benefit, a promise to forbear a groundless suit against a third person, and a promise to refrain from committing a tort against a third person. These consequences seem sufficient reason for discarding this theory. If a promise to receive a pure benefit, for instance a gift, is sufficient consideration for a promise to give it, an easy way is offered to make, in effect, a valid gift without delivery; and it may well be doubted whether the courts would sanction such a result.<sup>2</sup> A mutual agreement to rescind a unilateral obligation, which is much the same thing as a promise to give, is, it is well settled, ineffectual.<sup>3</sup> There is nothing in the cases relating to forbearance and promises of forbearance to warrant the supposition that the case would be treated differently when the groundless suit to be forborne is against a third person, and an in-

<sup>1</sup> 4th ed., pp. 178, 179.

<sup>2</sup> Holmes, *Common Law*, 304.

<sup>3</sup> *Foster v. Dawber*, 6 Ex. 839, 851; *Williams v. Stern*, 5 Q. B. D. 409; *Westmoreland v. Porter*, 75 Ala. 452; *Crawford v. Millsbaugh*, 13 Johns. 87; *Kidder v. Kidder*, 33 Pa. 268.



complete search has revealed at least one case where such a promise was held an insufficient consideration.<sup>1</sup> It is of course certain that a promise to forbear to commit a tort against a third person is not a valid consideration. This must be accounted for under the view now criticised as resting solely on public policy, but it has generally been supposed that such an agreement also lacked consideration. We are therefore driven to the alternative of modifying the ordinarily received definition of consideration. If the test of the sufficiency of consideration be made whether the promisee has incurred a detriment at the request of the promisor (which would constitute a unilateral contract), or has promised something the performance of which will be, or may be,<sup>2</sup> a detriment (which would constitute a bilateral contract), logical consistency is attained. Nor is it attained at the expense of disregarding the authorities. The assertion is ventured that an examination of the cases will show that, however, judges define consideration, when they examine the sufficiency of consideration, either in case of unilateral or bilateral contracts, it is the thing to be done which they consider, — the performance, not the fact that there is an obligation to perform.<sup>3</sup>

Furthermore, in 1875, Lush, J., delivering the opinion of the Court of Exchequer Chamber, in *Currie v. Misa*,<sup>4</sup> said, "A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit, accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or *undertaken* by the other." This definition, which involves substantially the distinction contended for, is adopted by Pollock<sup>5</sup> and Anson.<sup>6</sup>

Though Anson's criticism of the theory advanced by others must be deemed sound, his own explanation cannot be accepted as satisfactory. It may be granted that a promise not to rescind the earlier contract would serve as consideration for a promise. It is doubtful whether merely failing to rescind would

<sup>1</sup> *Bates v. Sandy*, 27 Ill. App. 552.

<sup>2</sup> It is sufficient if the performance promised may be a detriment. A promise to insure, for instance, may be performed in a particular case without detriment, but the chance that it may not be is sufficient to make it a good consideration.

<sup>3</sup> See, for instance, Lord Abinger's reasoning in *Jones v. Waite*, 5 Bing. N. C. 341, 356, or that of Brown, J., in *Robinson v. Jewett*, 116 N. Y. 40, 53. In each of these cases, speaking of a contract clearly bilateral, the court pointed out the insufficiency of the thing promised.

<sup>4</sup> L. R. 10 Ex. 153, 162.

<sup>5</sup> 4th ed., p. 167.

<sup>6</sup> 2d ed., p. 69.

be sufficient without proof that the willingness of the other party to the contract made rescission possible, and therefore refraining from it a detriment. But the great difficulty with the theory is that it does not fit the facts. It may well be that one of the parties to the second contract is not aware of the existence of the earlier contract, and, in any event, a rescission of the earlier contract might obviously be made without liability on the second contract if the performance promised was actually carried out. If that be done, the second promisor cares nothing whether the original contract remains in force or is abrogated.<sup>1</sup>

It may, however, be argued that though performance of the prior contract be not a good consideration because unless it appears that both parties to that contract were willing to rescind, no detriment to the promisee can be found, yet a promise of such performance is a good consideration because, owing to the possibility of a rescission or other excuse for not carrying out the prior contract, performance of the second contract when the time for performance comes may be a detriment. This is the strongest argument that can be made in support of the second contract. But it goes too far. In every case where the promisor is already bound to do the thing promised, it is possible that, before the time the performance arrives, the earlier bond may be released by change in the law or otherwise. The truth is that the law deals with the question, and as a practical matter must deal with the question, on the supposition that the obligations binding the parties to-day will continue to bind them, and hence the second promise is *nudum pactum*.

There is but one case in which the court takes the distinction between the validity of a unilateral and a bilateral contract put forward by Sir Frederick Pollock and Professor Langdell, though afterwards withdrawn by the former. In *Merrick v. Giddings*,<sup>2</sup> on the authority of these writers, the distinction was asserted. Since Anson's criticism of this view and Pollock's withdrawal of it from the later editions of his treatise, *Merrick v. Giddings* is not likely to be followed, and certainly it is of doubtful expediency to establish so delicate a distinction between bilateral and unilat-

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<sup>1</sup> It must be remembered that English text-writers labor under the disadvantage of feeling bound to support and furnish some explanation of the decisions in *Shadwell v. Shadwell* and *Scotson v. Pegg*. If it were not for this, it is quite possible that the matter would be discussed in another fashion.

<sup>2</sup> 1 Mack. (D. C.) 394.



eral contracts. The almost uniform current of authority in this country is that neither performance nor promise of performance of what one is already bound to do by contract with a third person, is a sufficient consideration to support a promise.<sup>1</sup>

The only American authority to the contrary, aside from *Merrick v. Giddings*, is a remark in *Day v. Gardner*,<sup>2</sup> which was a bill to foreclose a mortgage, in defence of which there was set up a contract, that if the defendant paid certain taxes the mortgage should be reduced. The court, after holding that the defendant was not otherwise liable to pay the taxes, said: "But if a personal liability had existed, the duty which such liability would have imposed would have been a duty to the government, which was entitled to the taxes, and not to the mortgagee; and I am not prepared to say that, in such a condition of affairs, the collateral benefit resulting to the mortgagee from the payment of taxes which were entitled to priority in payment over his mortgage, would not constitute a perfectly valid consideration for such a contract as that on which the defence in this case rests." But this *dictum* can have little weight as against the numerous decisions already cited, which enforce the rule, at once logical, readily understood and applied, and as just in its operation as any hard-and-fast rule can be, that neither performance nor promise of performance of what one is already bound to perform is a valid consideration.

Samuel Williston.

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<sup>1</sup> See *Johnson's Adm. v. Seller's Adm.*, 33 Ala. 265; *Havana Press Drill Co. v. Ashurst*, 35 N. E. Rep. 873 (Ill. 1893); *Peelman v. Peelman*, 4 Ind. 612; *Ford v. Garner*, 15 Ind. 298; *Reynolds v. Nugent*, 25 Ind. 328; *Ritenour v. Mathews*, 42 Ind. 7; *Brownlee v. Lowe*, 117 Ind. 420; *Newton v. Chicago, &c. Ry. Co.*, 66 Iowa, 422; *Schuler v. Myton*, 48 Kan. 282; *Putnam v. Woodbury*, 68 Me. 58; *Gordon v. Gordon*, 56 N. H. 170; *Bartlett v. Wyman*, 14 Johns. 260; *Vanderbilt v. Schréyer*, 91 N. Y. 392; *Seybolt v. N. Y., L. E. & W. R. R. Co.*, 95 N. Y. 562; *Robinson v. Jewett*, 116 N. Y. 40; *Sherwin v. Brigham*, 39 Ohio St. 137; *Wimer v. Overseers of the Poor*, 104 Pa. 317; *Davenport v. Congregational Society*, 33 Wis. 387.

<sup>2</sup> 42 N. J. Eq. 199.

## WOMAN IN EARLY ROMAN LAW.

THE foundation of archaic society, or, if the expression be permitted, its legal unit, at least among all branches of the Aryan race whose histories and antiquities are known to us, was the family, and not, as in modern times, the individual. Hence it would be but natural that woman's position in law would be largely, if not wholly, determined by her position in the legal unit. And as the conception of the ancient family or, perhaps, to speak more correctly, the particular line which the conception followed, was due in a very marked degree, to the peculiar religious beliefs of early times, it is imperative that we premise our present investigation with an examination of the religion of men of even greater antiquity than the Roman of history.

The Aryans,<sup>2</sup> as far back in the night of ages as our gaze can penetrate, never believed that at the close of man's short earthly existence all was ended for him. They looked upon death, not as a dissolution of our being, but simply as a change of life.<sup>3</sup> In the belief of these primitive men, the human soul after death resided with its body in the tomb. From its living descendants it demanded sacrifices and food offerings. Each family, therefore, had its own tomb always situated near the house, so that the living could easily hold communion with the dead. The happiness of the dead depended on this proximity to the living. Though no longer of this life, they still needed the food and drink prepared for them by their pious descendants. In return, they protected the living, and gave them pure thoughts and a happy life. The failure to make the proper offerings to his ancestors was the most impious act that a man could be guilty of. The deserted dead fell from their blissful state. They became malignant demons,

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<sup>1</sup> The period to which this essay is confined cannot be shown by exact dates. Suffice it to say, however, that only that portion of woman's legal history is here examined, which is antecedent to the time when, in the last years of the republic, she began her memorable advance from legal nonentity to her enviable position as the decided favorite of Roman jurisprudence.

<sup>2</sup> The theory here advanced of the ancient religion of Italy is that of Fastel de Coulanges, as found in "*La Cité antique*," English translation, by Willard Small, Boston and New York, 1889, pp. 15-48.

<sup>3</sup> Coulanges, *The Ancient City*, Mr. Small's translation, p. 15.



the only object of whose spiritual existence was the torment and final destruction of their undutiful posterity. Such "negligence was nothing less than the crime of parricide, multiplied as many times as there were ancestors in the family."<sup>1</sup> The logical result of such a religion could be nought else than the closer union of the members of a family, and, finally, the firm establishment of the family as the unit of any subsequent political group.

There was another religious custom of those primitive times so closely linked with the worship of the dead that both, at the time they become known to history, though perhaps originally distinct (a question now impossible to determine), formed together but one religion. This was the worship of the sacred fire, which in the far interior of every Roman house burnt with an undying flame upon the family altar. This fire was to these ancient men a god, a powerful, beneficent god, whose protection they were continually beseeching. Yet the sacred fire of each household was but the special providence of its own particular family, and was sometimes called by the name of an ancestor. For in the practice of this twofold religion there were no rules common to all the families of a community or a race. The rites and ceremonies of each household were secret. The divine fire and the ancestral spirit were blended into the household gods (*Lares, Penates*). These gods protected their own worshippers, and left the stranger to the care of his own divinities. No interference on the part of the community or state, even in much later times, was ever thought of.

Of this exclusive religion of the family, the father was the high-priest. He had supreme authority in all matters pertaining to the family worship; he alone was able to perpetuate the ancestral religion, by teaching his sons the songs, rituals, and ceremonies that he had learned from his father; and on his death he too was numbered among the ancestral gods. Before the family altar women had no independent place. They took part in the ceremonies only through their fathers or husbands. Nor did they attain godship after their decease. In death, as in life, their identity was lost in that of their male relatives. And in this old religious supremacy of the man, rather than in his physical superiority, do we find the origin of woman's political and legal subordination, so characteristic of all, or nearly all, Aryan races.

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<sup>1</sup> Coulanges, *ubi supra*, p. 43.

These primitive men had no conception of creation; to them generation was the transcendent mystery of life. In their belief the male alone possessed the power of reproduction. "The generator appeared to them to be a divine being, and they adored their [male] ancestor."<sup>1</sup>

The law accepted this supremacy of the father because no other conception of the paternal position could have been possible to believers in this old religion. From his position as high-priest of the family worship came that life-long authority over the other members of his household bestowed by this archaic society upon the father, — that authority which, known in Roman jurisprudence as *Patria Potestas*, is in its effects the most far-reaching subject of the early private law of Rome.

In ancient times, the father's control over his children, *i. e.* the *patria potestas*, was probably so nearly assimilated to the power of the master over the slave that it would be difficult to say wherein a child's position was superior to a slave's. "The heir, as long as he is a child, differeth nothing from a slave, though he be lord of all."<sup>2</sup> However, when history first reveals to us the practical exercise of this power, there had evidently been some modification of pristine severity. Rome's public law (*jus publicum*) took no notice whatever of the father's *potestas*. A son under power could hold any office in the state, and could, as *judex*, even pass judgment on his father's contracts, and punish his delinquencies. On the other hand, in the domain of private law (*jus privatum*) the authority of the father continued undiminished during the whole period of the republic, and for many years of the empire. At the birth of a child, the father was the sole judge of its legitimacy. He could expose the new-born babe or condemn to death the full-grown son. His was the right to emancipate or adopt a child. He could sell his own flesh and blood to another; though herein the son's plight is seen to have been better than the slave's; for when sold to a Roman citizen the son retained his freedom as to public rights, and only his labor or its fruits could be claimed by his purchaser. On the other hand, the son was as incapable of possessing, and therefore of transmitting, title to any property, as the slave; and though he could acquire legal rights, everything the child under power acquired at once became the property of his father. No action whatever could lie between father and son,

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<sup>1</sup> Coulanges, *ubi supra*, p. 45.

<sup>2</sup> Galatians, iv, 1.



as the jurists held that their legal identity was so complete as to render such a proceeding equivalent to the father suing himself. For the same reason, contracts between them were impossible. An injury done the son was done the father, who alone could bring suit for the proper damages. The father, was, however, responsible for his son's torts; but he could escape the legal penalties in such cases by surrendering the person of the wrong-doer to the complainant.<sup>1</sup>

Thus, we see that the authority of the father over the son was in nowise constrained by law. What few checks there were, were imposed by religion. A man who sold his married son was given over to the infernal gods. When a father contemplated the death of a child, he was required to summon a council of its blood relatives, maternal as well as paternal, to whom he was to submit the question of the child's death. But the power of this council was merely advisory. If the father had the hardihood to brave public opinion and to defy religious excommunication, he could in no way be prevented from even the severest exercise of his paternal power.

We have given this somewhat lengthy exposition of the *patria potestas*, and the son's place under it, because from the status of the son we have already learned, to a great extent, the condition of the daughter. For, as long as the *paterfamilias* lived, whatever difference there was in the conditions of the son and daughter, as far as their private rights were concerned, was entirely in favor of the son. The unmarried daughter, like the son, was entirely at the disposal of the father, who could sell her or condemn her to death; and while an early law prohibited altogether the exposure of male infants, except in cases of deformity, the only restriction placed upon the exposure of female infants was the rule that the father should rear at least his first-born daughter. Custom in some respects was favorable to girls, as it was early looked upon as a most barbarous and inhuman act to make a noxal surrender of a daughter. And in the inheritance of her father's estate the daughter took an equal share with the son, provided she had not by marriage left her father's family.

On the other hand, the public law of Rome did not recognize woman at all. Women were answerable for their misdeeds to the family judge, the father or husband, as is proven by Livy's account

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<sup>1</sup> In Roman law, *noxae deditio* (noxal surrender).

of the suppression of the worship of Bacchus at Rome.<sup>1</sup> In this case the men were punished by the state, but the women had to be given over to the private jurisdiction of the family. A passage from Gaius also well illustrates the complete ignoring of women by the public law of Rome. "It should be noted," says he, "that nothing can be granted in the way of justice to those under power, *i. e.* to slaves, children, and wives. For it is reasonable to conclude that, since these persons can own no property, they are incompetent to claim anything in point of law."<sup>2</sup> So we find that women were ineligible as witnesses in court.

Another disability arising from their non-recognition by the public law of Rome, was their inability to make wills. In the early days of Rome a will could be made only in one of two ways: either by an oral declaration, when, on the eve of battle, the legion was drawn up in line (*in procinctu*), in readiness to march to the field; or by publication in an assembly called the *comitia calata*, whose assent was necessary to the validity of the will. It is quite obvious that the first method was impossible for a woman; while it will be equally plain that she was unable to publish a will in the *comitia*, when we learn that women had no place in that assembly, none but heads of households, Roman citizens, being there admitted.

When she reached the age of seven years, the Roman maiden could be betrothed by her father to the man of his choice; and the law by a pleasant fiction supposed that the intended groom was her choice also. For it was a lasting principle of Roman law that not only *connubium* (right of intermarriage), but also consent, were necessary to a valid tying of the nuptial knot. The term "consent" here included not only the woman's consent but his also in whose power she was. By holding, however, that a daughter was entirely subject to her father's will, the necessity of her consent was made merely nominal. And although, at this period, such an eminently just principle of law seems to have been a mere mockery, yet in the latter years of the republic, and during the empire, it was of great importance to women in their struggle for equal rights.

Whether in early Rome suit could be brought for the non-performance of a marriage contract, is not now known, although a passage from Sulpicius Rufus,<sup>3</sup> an eminent jurist who flourished

<sup>1</sup> Book XXXIX., ch. 18.

<sup>2</sup> Gaius II., 96.

<sup>3</sup> Preserved by Gellius; see Smith, Dictionary of Greek and Roman Antiquities, article, Matrimonium, by Geo. Long.



about 700 A. U. C., shows conclusively that, in his time, at least, such a contract was actionable.

Upon the marriage of a daughter, the father's power over her was merely transferred to the husband. It was then called *manus*, and could arise only from a marriage sanctioned by law (*justum matrimonium*). Under the kings, and during the earliest days of the republic, there was but one form of marriage in which the patrician, then the only Roman citizen, would permit himself to take part. This was the marriage sanctioned by the old religion already spoken of. It was called *Confarreatio*. It took place in presence of the *pontifex maximus*, and of ten witnesses, probably representative of the ten *curiæ* or wards of ancient Rome. In the words of Gaius, it was "a ceremony in which they used a cake of spelt (*farreus panis*), whence the name is derived, and various acts are required to be done with a traditional form of words."<sup>1</sup> It was entirely a matter of religion; and, doubtless, in the belief of the devotees of that ancient ancestral worship, it was the only ceremony by which the wife could be initiated into the mysteries of the family altar, and bear children to perpetuate the race, to keep alive the sacred fire, and to make prayers and offerings to the ancestral dead.

Another form of marriage, at first probably peculiar to the plebeians, was also recognized by the law as capable of conferring *manus* over the wife, and *potestas* over the children, though, most likely, not until after the passage of the Lex Camuleia, in the year 308 A. U. C., repealing that enactment of the Twelve Tables<sup>2</sup> which forbade marriage between a patrician and a plebeian. This marriage was called *Cæmptio*, defined by Gaius as "an imaginary sale, in the presence of at least five witnesses, Roman citizens above the age of puberty, besides a balance-holder."<sup>3</sup> In its origin it was, undoubtedly, not an imaginary sale but a real one.

Still another form of marriage, or more properly, another method of conferring on the husband power over his wife and children, was that peculiar acquisition—it can hardly be called ceremony, for there was but little ceremony about it—of the wife known as *usus*. The husband, after a year of continuous cohabitation, acquired over his wife all marital powers. In other words, the husband gained the ownership of the wife by prescription, just as he would have done in the case of any movable chattel by the

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<sup>1</sup> Gaius I., 112.

<sup>2</sup> Table XI.

<sup>3</sup> Gaius I., 113.

undisturbed possession thereof for one year. The Twelve Tables, however, raised the wife so far above the chattel as to permit her, by absence from her husband's house for three consecutive nights each year, to defeat the *usus*,<sup>1</sup> and thus paved the way for the subsequent, gradual, yet steady amelioration of woman's place in law. Yet it is almost incredible that, among a people who used the highest form of marriage known to antiquity, there should also arise a form of union fit only for barbarians of the lowest type. Stranger still, within the lowest form were the germs of a better and brighter future for woman. The immediate results, however, of the higher forms of marriage were the same as those of the lower one of ownership by prescription. This anomaly of a high conception of the sacredness of the marriage tie, as illustrated by the *Confarreatio* ceremony, joined to such a low conception of the wife's legal rights, to which conception was due the two lower forms of marriage, can be explained only by those peculiar religious beliefs of the primitive Italians to which we have so often adverted. For had the husband's superior physical strength, as is often urged, and not his religious supremacy, been the cause of this unlimited control over the wife's person, the latter would have been looked upon simply as a slave to be used merely for the gratification of the master's pleasures. Far otherwise, however, was the Roman wife. She was the means by which the religion was to be kept alive; and, as we shall hereafter see, her social position was far better and happier than her legal rights, or her want of legal rights, would lead us to expect.

Upon marriage, the wife, as we have intimated, was entirely freed from her father's control. But she merely exchanged one master for another. She passed into her husband's *manus* or, if he were *in potestate*, under the same control as he himself was. She was as incapable of performing a legal act as an inanimate object, with the single exception that, upon her husband's death, she inherited his estate equally with her children. But this advantage was offset by the fact that she was incapable of inheriting anything from her father. Indeed she was no longer regarded as a relative of her blood father; but was considered as much a member of her husband's family as if she had been born in it. All her own property, which, at this early date, was doubtless very little, vested absolutely in her husband, and upon the dissolution of the mar-

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<sup>1</sup> Table VI.



riage there was no way in which she could recover it. Everything that she acquired during coverture, also, of course, became the property of her husband. In short, as the jurists expressed it, she stood to her husband in place of a daughter (*loco filiae*). All his powers over her were acquired not as husband but as father. Nor is there any doubt that, in the earliest times, the authority of the man over his wife was as unlimited as his authority over his slaves or children. But great restrictions are said to have been placed upon the capricious exercise of this fearful power, even in legendary times. Romulus is credited with having forbidden the killing of a wife except for adultery or wine-drinking. He is also said to have enacted the law that whoever sold his wife should be given over to the infernal gods; and if a wife were divorced on no just grounds, her ungrateful spouse's property was forfeit, one half to Ceres, and one half to his wife or her family. But a fragment of Cato the Censor shows what a terrible power was still wielded over the wife, even in historical times: "The husband is the judge of his wife. If she has committed a fault, he punishes her; if she has drunk wine, he condemns her; if she has been guilty of adultery, he kills her."<sup>1</sup> In the same fragment this perfect type of the early Romans says: "If you were to catch your wife in adultery, you would kill her with impunity without trial; but if she were to catch you, she would not dare to lay a finger upon you, and indeed she has no right."

Just as, in the opinion of the Roman jurist, consent was the essential ingredient of the marriage contract, so he considered consent necessary also for the continuance of the nuptial state, and all that was needed by him for its dissolution was an expression of such a desire by one of the contracting parties. And it was not until centuries after the fall of the republic that the law ever in any way regulated divorce. It is true that even in the earliest times a ceremony was necessary to dissolve the *confarreate* marriage; but this necessity was prescribed by religion and not by the civil law. Such dissolution of the marriage state was called *Diffarreatio*, and was the opposite process to *Confarreatio*. The cake was rejected in the presence of a priest and witnesses, and, instead of prayers, curses, spiteful and terrible, were pronounced by the quondam husband and wife.

The marriage by *Coemptio* was dissolved by *Remancipatio*, which

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<sup>1</sup> Fragment "De dote;" see Cato, his *Quae Extant*, H. Jordan, editor, Leipsic, 1860, p. 68.

was nothing more than a resale of the wife to her father, or some other male relative.

But it is in the form of dissolving the marriage by *usus* that we find the real origin of the peculiar Roman laxity in regard to divorce. Here all that was necessary was simply an expression of a desire or command by the husband that the wife should no longer dwell in his house. At the time of which we are now speaking in the dissolution of the *usus* marriage, as well as in the dissolution of the two higher forms of union, it is obvious that the wife was utterly powerless to make any resistance to a divorce pronounced by her husband, or on her side to repudiate him.<sup>1</sup> The theory of *manus* or marital power of the husband precluded all such privilege on the wife's part. For many centuries, however, the Romans seldom or never took advantage of the unjust privilege thus permitted them by law; perhaps because the woman was so completely under subjection that no excuse was ever offered for its exercise. As a proof of the statement that divorces very unfrequently, if ever, occurred, the old tradition that Spurius Carrilius Ruga, in the year 523 A. U. C., was the first Roman to divorce his wife, is confidently offered. For even if this story be an exaggeration, or even an untruth, the fact that it was believed by the writers of a few generations after Ruga shows that divorce must have been seldom resorted to in the early days of the republic. A further proof is the unpopularity which Ruga is said to have acquired by his act. The exercise of an undoubted legal right does not often render a man unpopular, unless by such exercise he unfortunately happen to oppose some popular prejudice. Had it been aught else but an innovation, and one, too, condemned by the public conscience, excuses would surely have been offered for the exercise of a power which later became so congenial to the Romans, who afterwards showed astonishing leniency in judging subsequent Rugas.

We must now retrace our steps and renew our acquaintance with the Roman maiden, who, in striking contrast to her unmarried English and American sisters, was subject to the same disabilities as the wife.

Upon the death of the father a great change occurred in the respective conditions of son and daughter. During the life of the parent, the son's rights were merely in abeyance. Upon the death

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<sup>1</sup> "When a man makes a divorce, he, not the censor, is the woman's judge." Cato, Fragment "De dote," Jordan's edition, p. 68.



of the head of a family, its male members themselves became *patresfamilias*, and succeeded to that power hitherto wielded by their father. Even in the lifetime of the parent independence was possible for the son. His father was able to emancipate him; thereby, it is true, the son lost all legal relationship to the family which had hitherto claimed him as a member. But, in return for this loss, he became *sui juris*, as the Roman lawyers expressed it; that is, independent of all authority save the state's. No such emancipation, either in her father's lifetime or after his death, ever fell to a woman's lot. In this respect, a slave was more fortunate, for freedom was possible for him. Even the full-grown woman was subject to the same restraint as a boy that had not yet reached the age of puberty. Whether single or married, the death of father or husband made no difference in a woman's legal position. It was utterly impossible for either husband or father to emancipate wife or daughter, no matter how intensely he might have longed to do so. For, if at her father's death no provision was made by testament for the female child's guardianship, the law supplied her with guardians. The same rule held when a husband's testament failed to provide guardians for his wife. In the ancient Roman law, women were always children; this condition being called by the jurist the perpetual tutelage of woman. "A sex created to please and obey," to quote the words of Gibbon,<sup>1</sup> "was never supposed to have attained the age of reason and experience." In this life-long bondage of woman do we find further testimony of the overwhelming importance of the family in ancient society. This peculiar contrivance of archaic jurisprudence to keep a woman in the bondage of her family for life is obviously but an artificial prolongation of that most important factor of the primitive family, the *patria potestas*, when for other purposes it has been dissolved.<sup>2</sup> This intimate connection between the guardianship of woman and family law is very plainly seen, if it be noticed upon what persons the law threw the tutelage of women. For, since the maiden succeeded to a share of her father's estate, at his death, the nearest male relatives of the deceased, in case the latter himself had made no appointment by testament, became her legal guardians. While, if married, since the wife succeeded to a share of her husband's property upon his decease, the latter's nearest male relatives were called by law to the wife's guardian-

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<sup>1</sup> Decline and Fall, ch. 44.

<sup>2</sup> Maine, Ancient Law, New York, 1878, pp. 147-148.

ship, in default of appointment by will. The object of all this cannot escape our attention. The guardians would see to it that the property of the maid or widow did not pass out of their respective families. Although this law gradually fell into disuse in the closing years of the republic and during the empire, there is no doubt that, at the time of which we write, it existed in all its disagreeable severity. A woman could alienate none of her property, nor enter into any kind of contract, not even that of marriage, without the consent of her guardians. "Her inheritance, therefore, was hers in name only; in reality, it was in the hands of her guardians."<sup>1</sup> In the language of Livy:<sup>2</sup> "To every act, even of a private character, done by a woman, our ancestors required the sanction of a guardian." Even with this sanction she could not make a will or emancipate a child. The first, as has been stated, was a public act, and a woman was absolutely unknown to the public law. She could not emancipate, because, as she herself was never free from control, it was impossible for her to have a child under power, either by birth or adoption, whom she could make *sui juris*.

To this almost universal nonentity of woman in law there was one surprising exception. The Vestal Virgins enjoyed great and exceptional privileges. Upon their induction to office, they were immediately freed from all paternal control. They could be witnesses in a court of justice, where no oath was required of them. If a criminal, on his way to execution, chanced to meet a Vestal, he was immediately set free. They also enjoyed many other high privileges, which, in spite of the fact that they could never marry, must have made it very desirable for a Roman maiden to become a priestess of Vesta.

It is quite a relief, after an examination of woman's legal position in these bygone days, to turn our attention to the private life of the Romans, and learn how the gentler sex were treated socially. Here do we find another proof of the great superiority of the Roman race to other nations of antiquity in all that affects the welfare of society and the progress of government. Woman's place in the private life of even the earliest Romans was very high. She was not confined to her apartments, as in Hellas, but was permitted to mingle freely with her husband's guests. She could

<sup>1</sup> Muirhead, Historical Introduction to the Private Law of Rome, Edinburgh, 1886, pp. 44-45.

<sup>2</sup> Book XXXIV., ch. 2.



walk in public whenever so disposed, and could even attend the theatres. In our eyes these seem very trivial privileges; but if we call to mind the absurd restrictions placed upon the movements of Greek and other women of antiquity, we must confess that these trifling concessions were a great stride towards that perfect equality of the sexes finally reached in Rome. As Becker truly says: <sup>1</sup> "The Roman housewife always appears as the mistress of the household economy, and guardian of the honor of the house, equally esteemed with the *paterfamilias* in and out the house." The most important part of the Roman dwelling, the *atrium*, was given up to the matron. There she managed the household and ruled her female servants; and, in the houses of the upper classes, she performed no menial labor, for which work the wealthier Roman householder always provided slaves. To such a high respect for woman socially, together with the high conception of marriage, shown by the *confarreate* marriage, is due that continual progress of woman in historical times to a higher legal place, — that progress which is the pleasure of every student of Roman law and custom to trace.

*John Andrew Couch.*

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<sup>1</sup> Gallus, translated by Rev. Frederick Metcalf, London, 1853, p. 153.

# HARVARD LAW REVIEW.

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THE LAW SCHOOL. — Since the note on the "Law Library" in the last number of the REVIEW was written, a catalogue has been found in the General Library at Gore Hall, which was published in 1826, seven years earlier than the first official edition compiled by Mr. Sumner. It is a pamphlet of twenty-five pages. In it are the following notes, in the handwriting of a former librarian of Harvard College, the late Mr. John L. Sibley: —

"This was the first catalogue of the Law Library ever published. It was prepared by John B. Hill and William G. Stearns [then members of the school]. The expense was not borne by the Faculty or Corporation. The students wanted a catalogue, and this was prepared and sold among themselves.

"The books marked with a star belonged to Professor Stearns, but were put with the Law Library, and used by the students. Those marked with the dagger belonged to the College Library, and were kept in the College Library. Professor Stearns's books were subsequently withdrawn."

This catalogue contains about six hundred titles, comprising a little over thirteen hundred volumes. Deducting the books belonging to the College Library and to Professor Stearns, there remain about eight hundred volumes in the actual possession of the Law Library at this early date.

In October, 1832, a portion of the present Dane Hall was completed, and in that month the Law School commenced to occupy its new quarters. The library was accordingly removed from College House to the new building. In 1845, Dane Hall was greatly enlarged, in consequence of the rapidly increasing numbers of the school. The College House, above mentioned, was not the present structure, and it is described in the Life of Judge Story as a very old, low-studded, wooden building, which had been long inhabited by the college students, and went by the name of First College House. The two rooms appropriated to the Law School were in the second story of this house.



In Quincy's history of Harvard University, published in 1840, it is stated that the Law Library contains about 6,100 volumes. This shows a very rapid growth from 1833, — doubling in seven years. It is further stated to contain most of the valuable works in English and American Law, and in the Civil Law, together with a variety of others by writers of France, Spain, and Germany. At the end of 1858, the number of volumes is set down as 8,030, exclusive of text-books to be loaned to students. During the year 1857-58, 150 volumes were lost, and 111 volumes were added to the library. In 1870, the collection had increased to 12,800, the number added during 1869-70 being 198. It thus appears that the library nearly doubled in size from 1833 to 1840, and that in 1870 it was only a little more than twice as great as it was in 1840. It had a very rapid growth in the first period, and a much slower in the second. This was, doubtless, partly due to the fact that the earlier time was during the establishment of the library as a collection, but more to the prosperity of the school. In these earlier years the number of volumes received as gifts was also much larger than in the last-named period.

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HARVARD LAW SCHOOL ASSOCIATION. — The annual report of the treasurer of the Harvard Law School Association shows a gratifying increase in the number of members, — the decrease of last year being overbalanced, and a net increase made of twenty-three since 1892. During the last year, the association has appropriated out of its income enough to send the copy of the REVIEW containing Professor Langdell's portrait to every member, and to establish and maintain for the current year the valuable course upon Conflict of Laws given by Professor Beale. It has been in many other ways, as always, a power for the good of the School.

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MR. JUSTICE HOLMES'S ARTICLE. — Any one who has tried to follow the cases in which employers have sued the members of trades unions for interference with that pursuit of business which, they claim, ought to be unhampered, and the other litigation arising out of the same general question, must have been perplexed and exhausted, both by the contrariety of the decisions and the variety and inconsistency of the reasons assigned. The courts, in apparent unconsciousness, have taken steps leading — no man can see precisely whither. Mr. Wigmore, some years ago (21 Am. L. Rev. 509, 764), tried to explain all the cases, except *Walker v. Cronin*, 107 Mass. 555, on grounds of intimidation and the like; but in view of the more recent decisions, so simple an explanation will no longer serve. From this standpoint, Mr. Justice Holmes's discussion of malice and intent, with which the REVIEW makes an auspicious beginning of its eighth volume, possesses peculiar interest. Whatever view may be taken of the decisions, it is evidently of prime importance that the courts should proceed in this manner with a clearer understanding than that which they now manifest, for the contrariety of decisions, some of them backed up by reasoning not always pertinent or consistent, will naturally do as much toward fomenting the costly quarrels which they seek to decide, as treatment of the matter such as Mr. Justice Holmes's should do toward clarifying the discussion and removing the misunderstanding, which is the cause of nine-tenths of the trouble.

**PRIVILEGED OCCASION.** — In dealing with the contention of the defendant in *Pullman v. Hill*, L. R. (1891) 1 Q. B. 524, where it will be remembered that the occasion was held not to be privileged when a merchant dictated a libellous letter to his stenographer to be type-written, Kay, L. J., remarked: "The consequences of such an alteration in the law of libel would be this: that any merchant, or any *solicitor*, who desired to write a libel concerning any person, would be privileged to communicate the libel to any agent he pleased, if it was in the ordinary course of his business."

This dictum is of interest in view of the recent case of *Boxsius v. Goblet Frères et al.*, 10 Times L. R. 324, where a sharp distinction is drawn between merchants and solicitors. Both cases were in the Court of Appeal. In the latter, the court recognized the fact that it was an ordinary and frequent part of the business of solicitors to write letters containing defamatory matter, and, on that account, it concluded that solicitors should be allowed to discharge their duty to their clients in such a reasonably necessary and usual way as dictating letters, though libellous, to a stenographer, and having them afterwards copied by an office boy in a copy press. The decision seems sound, and in no way contradictory to the former case, if it simply enforces that well-established condition of privilege, that a defendant must not give a libellous statement greater publicity than is apparently reasonably necessary to discharge the duty or protect the interest which gives rise to the "occasion;" but if it is to be inferred from the doubtful language of the decision, that the case of a solicitor is to be treated as an exception to the general rule, it may seem, especially to laymen, as if the court attempted to grant another exemption to an already favored profession. Rightly considered, the case should be regarded as laying down a principle equally applicable to occupations such as commercial agencies, where similar communications to clerks are just as essential.

**CONSTITUTIONAL DISSENT IN MASSACHUSETTS.** — The Supreme Court of Massachusetts has several times within the past few years had to consider points in constitutional law whose decision turned upon questions of economics, and of the policy of farther extension of the powers and duties of the State, far more than upon the mere construction of the written instrument; and the opinions drawn out by the consideration of these points have shown a most interesting divergence. The cases are of two classes,—those which discuss contemplated regulation or assistance of private enterprise by the State, and those which discuss changes in the mode or extent of doing business by the State. In both sets of cases Mr. Justice Holmes is consistently in favor of the constitutionality, while not committing himself about the expediency, of the changes so far adjudicated upon by the court, and this, apparently, because he can find no provisions in the Constitution which assuredly forbid such changes. In the Interchangeable Mileage Ticket Case, the best example of the first class of cases (*Atty.-Gen. v. Old Colony R. R.*, 35 N. E. 252), he was accompanied by Mr. Justice Knowlton; and in the Municipal Coal Yards Case (*Opinion of the Justices*, 155 Mass. 598), and on the question of the Referendum (*Opinion of the Justices*, 36 N. E. 488), examples of the second class, by Mr. Justice Barker.

On the other side, Chief-Justice Field once thought that a statute



of the first class went too far in allowing the use of eminent domain for the creation of private trout ponds; and in this he was alone. *Turner v. Nye*, 154 Mass. 579. He and the remaining three Justices (Allen, Lathrop, Morton) went so far as to agree with the others in recognizing in the Gas and Electric Lighting Case (*Opinion of the Justices*, 150 Mass. 592), the propriety of the furnishing of artificial light by the State. These four Justices, however, the majority of the court, are generally against statutes which seem to involve either more regulation of industry, or any change in the mode or extent of doing business by the State (for a consideration of the cases, see an article by Mr. Jabez Fox, in 5 HARVARD LAW REVIEW, 30).

Such a continued and outspoken difference of opinion must go far toward preventing the decisions of the court from having the authority upon the subject which they otherwise might, and toward keeping the general question of the advisability of such frequent declaring of laws unconstitutional an open one. It is also to be noted that the views of the present majority are opposed to what are currently believed to be certain tendencies of the present development of society. It will be extremely interesting to see whether, when thus opposed, the tendencies will prove to be only ephemeral, or whether, the tendencies remaining, legislation of these kinds will be blocked only for a time.

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ENGLISH AND SCOTCH LAW—SALE OF GOODS ACT.—In 1888, Judge Chalmers drafted a codification of the Law of Sales of Personal Property, with the object of assimilating the Scotch and English law on this subject. Since 1889, it has been before Parliament, and, on February 20, it received the Royal assent. It makes little change in the law in England, but very important changes in the law of Scotland, especially in regard to the passing of the property in specific goods sold but not delivered, and also in regard to the law of warranty (*actio quanti minoris*).

It is interesting to American lawyers—who see a similar process going on in Louisiana—to observe the progress the English law has been making in Scotland since the Union, and especially during the last fifty years. The passage of this Act is only one of many indications to this effect. One might cite numerous other statutes in this connection. The Mercantile Law Amendment Act of 1856, for instance, extended to Scotland several important features of the English law of sales. It changed much of the Scotch law respecting warranties as to quantity and quality, and introduced many of the practical effects of the rule, although not the rule itself, that the title to specific goods sold passes by force of the contract alone. Nor has this process of assimilation been effected entirely by statutes. Judicial legislation has accomplished much. The House of Lords, as Supreme Court of Appeals from Scotland, has exercised no influence in this direction. Through this channel, for instance, the right of stoppage *in transitu* appears to have made its way north.

As the old intimacy of Scotland with France and the Continent profoundly affected her law, public and private, so now her close association with England seems to be leading to similar results. Naturally, this "reception" has been confined chiefly to commercial law. But many other branches of the law have been influenced more or less. One need only cite the introduction of trial by jury, even in civil cases, and as a

result the importation of much of the English law of evidence, — a result which, by the way, has not followed from the introduction of the jury on the Continent. While the English law shows an occasional trace of Scotch influence, the reverse is very much more common and apparent, and one may look for further evidence of it in the future.

**FIXTURES — VENDOR v. PRIOR MORTGAGEE.** — The Court of Appeal last month, in the case of *Gough v. Wood & Co.*, 10 Times L. R. 318, decided that an agreement between the vendor of a fixture and a lessee that the fixture should remain the property of the vendor until wholly paid for, was a bar to the right of the mortgagee of the lease. The mortgage in this case was executed before the annexation of the chattel, and neither the mortgagee had notice of the agreement nor the vendor of the mortgage. The court followed the decision of North, J., in *In re Maryport Hematite Iron Co.* (1892), 1 Ch. 415, — a case precisely similar to this, except that the mortgage there included machinery, etc., “hereafter to be acquired.” Weight was also put upon the case of *Sanders v. Davis*, L. R. 15 Q. B. D. 218, where the mortgage by a lessee of chattels annexed by him was held superior to a prior mortgage of the premises by the lessors.

It is law both in England and this country that fixtures annexed by the mortgagor, whether before or after the mortgage, go to the mortgagee (*Walmsley v. Milne*, 7 C. B. N. S. 115; *McLaughlin v. Nash*, 14 Allen, 136; *Davenport v. Shants*, 43 Vt. 546; *Brennan v. Whitaker*, 15 Ohio St. 446), and this rests upon the obviously good reason that a mortgagor, knowing the mortgagee's title in the property, may be said to have chosen to add to its value for his own purposes while in possession, and in view of his own equity of redemption. The case of real difficulty is the one where the mortgagee's interest is not harmed, and the annexation is after the mortgage by an ignorant vendor. It may be said that the vendor, although ignorant of the mortgage, has yet consented to make his property part of the soil, and so must be content to abide the consequences; and there are cases in line with such a result, *Clary v. Owen*, 15 Gray, 522 (and compare the cases of partners taken in after the mortgage, *Ex parte Cotton*, 2 M. D. & D. 725; *Cullwick v. Swindell*, L. R. 3 Eq. 249). Or one may take the view of the present case, and give the vendor his property, allowing the privity between him and the mortgagor to overbalance his act of annexation, when that is in ignorance of the mortgage. *Davenport v. Shants*, *supra*. The reasons given in the case under discussion, however, that the mortgagee may be assumed to have consented to the annexation, seem a little hard to reconcile with the law that forfeits the mortgagor his own fixtures. If the mortgagee is to consent to a third party's putting fixtures on the land for the use of the mortgagor, why cannot he be said to consent to the mortgagor's putting his own upon it? The reason would seem to be better stated by the justice of the case, that the mortgagee is not hurt by the removal, and the innocent vendor's property is not lost to him.

With the exception of the case of *Davenport v. Shants*, there does not seem to be any authority precisely in point, for it is submitted that *In re Maryport Co.*, where the mortgage covered all to be acquired, goes further, and is really unfair to the mortgagee, whom the law wishes particularly to protect, not putting him in the position of landlord to tenant; while *Sanders v. Davis*, *supra*, also relied on by the Court, is really



no more than a tenant's right to fixtures, whether he holds under the mortgagor in possession or the mortgagee. The present case is, however, a good one apparently, and will, as Lindley, L. J., says, tend to reasonable security in dealing with mortgagors in possession, which could hardly exist if one was likely to have one's property confiscated, and be left to an action against a mortgagor who has been sold out, often not the solidest of debtors.

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AN UNFORTUNATE CREDITOR. — A case in the last Texas Reports has brought up squarely the question whether two joint debtors, by agreeing with each other to become respectively principal and surety, and by notifying the creditor of their agreement, may compel him to respect its terms, and to treat them thereafter as principal and surety. *Hall v. Johnson*, 24 S. W. Rep. 861, was the case of a continuing partner who agreed to indemnify his retiring copartner against payment of the firm debts; notice of this arrangement was given to the creditor. The majority of the court held that an extension of time given to the continuing partner discharged the retiring copartner, Fisher, C. J., dissenting. Each side marshalled its authorities (many of which are collected in 17 Amer. & Eng. Enc. Law, 1131) in full array, and the dissent went into a more extended examination of the principles involved.

The English courts, not content with the theoretical difficulty of the question, have still further complicated the question by disputing the effect of the decision in *Oakeley v. Pasheller*, 10 Bligh (N. S.), 548, in the House of Lords in 1836. In *Swire v. Redman*, 1 Q. B. D. 536, the court held that notice to the creditor of the new arrangement did not oblige him to treat the debtors as principal and surety, and said that *Oakeley v. Pasheller* went on the ground that the creditor had virtually assented to the new arrangement. Lord Justice Lindley, in his work on Partnership (5th edition, p. 252), considered this view of *Oakeley v. Pasheller* to be correct; but now in *Rouse v. Bradford Banking Co.*, 38 Sol. Law Jour. 270, he says that *Swire v. Redman* took the wrong view of *Oakeley v. Pasheller*, and that the law is settled the other way. A. L. Smith, L. J., agreed with him, and Kay, L. J., took the contrary view.

These cases have tied the Gordian knot so tight that it needs a decision of the House of Lords to cut it; but in the United States the case may be decided on principle. If we free the question from all analogy as to the rights of mortgagees who have notice of a conveyance by the mortgagor, and of a covenant by the grantee to pay the mortgage debt, it is simply this: Can two joint debtors agree to become principal and surety, and compel the creditor to treat them as such? Surely not. The creditor has a legal right, — how can his debtors force him to relinquish it? Generally the position of his debtors will not be a matter of importance to a creditor, and therefore it will not seem so unjust that equity, in order "to do a great right," should do a "little wrong," by depriving him of his theoretical right. But it may be very material to him. Suppose he thinks that the surest way to secure full payment of the debt is to take the time note of one of the debtors. If they are still joint debtors he may safely do this, and still hold the other; if they are principal and surety he must take the risk of being able to prove that he expressed himself as "reserving all rights against the surety," — a risk which was not part of his original contract, but which is now forced upon him against his will. It

is no answer to say that there are complete precautions against this risk, for there is no reason why he should be compelled to take such precautions.

"The contention is that the two . . . had a right to create a right in themselves, which, if observed, must derogate from the plaintiff's right, and then to say that it is inequitable in the plaintiff to act in derogation of this right so created. Surely the inequity begins earlier, and is in the defendant's derogating from the plaintiff's right without his consent." 1 Q. B. D. 536. This is the view of two of the Lords Justices, for Lindley, L. J., although he does not think *Swire v. Redman* to be law, says he should follow if he were free to do so. If the Texas court is correct, the creditor must at his peril remember to state that he reserves all his rights against the retiring partner, and, further, must be able to prove that he did so. Fisher, C. J., seems to hit the truth when he says, 24 S. W. Rep. 866: "An Act of the Legislature, or a judicial decision, that reaches to this extent, would unquestionably be opposed to the spirit of the fundamental law that protects the inviolability of contracts."

An interesting article in support of this view may be found in 14 Canadian Law Times, 57; but it must be admitted that the preponderance of authority is the other way.

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"SUPERIOR SERVANTS" AND VICE-PRINCIPALS. — A year ago a summary investigation of the fellow-servant rule would have shown that in about ten States, and in the Supreme Court of the United States, there was recognized, to a greater or less extent, a judicial doctrine, wholly distinct from the rule everywhere prevalent as to a master's duty to have fit appliances, safe premises, and competent servants, to the effect that where there is a superior servant to whom another owes obedience, the master is absolutely responsible to the subordinate for the negligence of the superior, at least within the sphere as to which there is subordination; and the same investigation would have shown that *Chicago, Mil. & St. Paul Ry. v. Ross*, 112 U. S. 377, decided Dec. 8, 1884, had done much to help toward wider acceptance of this doctrine, indifferently known as the "superior servant," or the "vice-principal" doctrine. To-day this doctrine stands in a different position, and its future depends, perhaps more than on any other one thing, upon the effect which *Baltimore & Ohio R. R. Co. v. Baugh*, 149 U. S. 368, decided last May, shall be deemed to have had on the Ross case. In the Ross case, a railway company was held to be responsible to a locomotive engineer for an injury resulting from the negligence of the conductor of his train. In the Baugh case, the company was held not to be responsible to a fireman for an injury resulting from the negligence of one who was acting as both conductor and engineer of a train consisting of engine and tender only; but two judges dissented, on the ground that to decide for the railway company was to overrule the Ross case. The majority thought that the two cases could be reconciled by considering a complete train as a distinct department of the company's business put in the conductor's charge.

There is, however, a great difference of opinion as to the real effect of this Baugh Case. In *Harley v. L. & N. R. R. Co.*, 57 Fed. R. 144 (C. C. Dist. Tenn., June 2, 1893), the doctrine of the Ross case was treated as so modified by the Baugh case that a new trial was granted,



because the jury had been instructed in accordance with the latter. The same view and the same result occurred in *What Cheer Coal Co. v. Johnson*, 56 Fed. R. 810 (C. C. A. Eighth Circuit, June 26, 1893), and yet in neither case was the Ross case treated as overruled. In *U. P. Ry. Co. v. Callaghan*, 56 Fed. R. 988 (C. C. A. Eighth Circuit, July 10, 1893), the Ross case was followed as to a conductor and an employee merely riding on the train. In *Minneapolis v. Lundin*, 58 Fed. R. 525 (C. C. A. Eighth Circuit, Oct. 30, 1893), the Ross case was not treated as overruled, and the doctrine of the Federal courts was said by Sanborn, J., to be, that if an employee is "entrusted with the entire management and supervision of all the business of the corporation, or with the entire management and supervision of a distinct and separate department of its business, . . . he may be termed a general vice-principal, because, in all his acts relative to the business of the corporation, he stands in the place of the master, and the latter is liable." So in *Bloyd v. St. L. & S. F. Ry. Co.*, 22 S. W. 1089 (Ark., July 1, 1893), the Ross case and the Baugh case were held to be distinguishable. In *A. T. & S. F. Ry. v. Martin*, 34 Pac. R. 536 (N. Mex., Aug. 16, 1893), a very elaborately considered case, the Ross case is treated as overruled, and the Baugh case said to contain "the view . . . held by the majority of courts, which base the fellow-servant relation upon the character of the negligent act, rather than upon the grade or department of work." In *Ill. C. Ry. Co. v. Spence*, 23 S. W. 211 (Tenn., Sept. 21, 1893), the Ross case is also said to be overruled; and, finally, the Supreme Court of Rhode Island, in *Hanna v. Granger* (March, 1894), says, in deciding the case of one injured by the negligence of the engineer of a steam-roller, who, although in charge of the work, was held to be acting at the moment as a fellow-servant (followed by the same court in *De Marcho v. Builders' Iron Foundry*, where a foreman threw a box upon a pile of iron posts), says that the Ross case is "explained. Indeed, we may almost say that it is explained away" by the Baugh case.

In view of the difference of opinion, no one will care at present to say what the final effect of the authorities will be. In the Ross case the Supreme Court introduced the doctrine into good society. How will it get along now that its sponsor seems to have disowned it? And will its sponsor take it up again?

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## RECENT CASES.

AGENCY — INDEPENDENT CONTRACTOR — LIABILITY OF OWNER OF PREMISES. — Defendant company made a contract with A, whereby he was to "fall and burn" the bush on defendant's land. A negligently lit a fire on the land while there was a strong wind blowing in the direction of plaintiff's land. The fire spread to plaintiff's land, doing great damage. Held, that defendant was liable for the negligence of its contractor, on the ground that the act to be performed was one necessarily attended with great danger, and a proprietor who authorizes it is bound to see that all reasonable precaution is observed. *Black v. Christ Church Finance Co.* [1894], App. Cas. 48 (Eng.).

This decision rests upon a well-recognized exception to the "Independent Contractor" doctrine, viz., that a principal is liable for the negligence of his contractor in performing a duty which the law absolutely imposes on the principal, or which is in its nature dangerous and liable to result in injuries to third parties. Mechem on Agency, § 747. It seems quite clear that this case falls within the exception.

**BILLS AND NOTES — USURY — CONFLICT OF LAWS.** — Defendant, a resident of Iowa, borrowed money of plaintiff's transferor in New York, and gave a note dated as made in Iowa, but actually made in New York. No place of payment was stated. The rate of interest was stated to be seven per cent, — lawful in Iowa, but usurious in New York. *Held*, the parties executed this note intending it to be controlled by laws of Iowa, so it is valid and enforceable in that State. *Bigelow v. Burnham*, 57 N. W. 865 (Iowa).

There is quite a little authority holding, in accord with this case, that when a contract is made in one country or State to be performed in another, the validity of the contract is to be determined by the law of the latter place. Story, *Conflict Laws*, 7th ed. c. 280. Some of the earlier United States Supreme Court cases held this way, and New Hampshire, New Jersey, and New York seem to hold this view. *Contra*, are later United States cases, — Massachusetts, Illinois, Indiana, Iowa, and Wisconsin. A very good case holding this way is *Akers v. Demond*, 103 Mass. 318.

The view *Contra* seems correct for no contract has ever arisen, as the law of the State where the contract is made says that such a consideration shall be practically the same as no consideration.

**CONSTITUTIONAL LAW — POWER OF THE LEGISLATURE OVER THE CONTRACTS MADE BY EMPLOYERS WITH THEIR EMPLOYEES — CORPORATIONS AND NATURAL PERSONS DISTINGUISHED.** — The Legislature of Arkansas passed an Act requiring corporations, companies, and persons engaged in business of operating or constructing railroads, . . . and contractors and sub-contractors engaged in the construction of any such road, to pay their employees, on the day of discharge, the unpaid wages then earned by them, at contract price, without abatement or deduction. *Held*, that the Act was valid in so far as it applied to corporations, but was void as applied to natural persons. Bunn, C. J., dissented, thinking the Act void *in toto*. *Leep v. St. Louis, I. M. & S. Ry. Co.*, 25 S. W. Rep. 75 (Ark.).

Cases of this nature are becoming more and more common, and the decisions in the different States are not altogether in harmony. The distinction which is made in the above case between natural persons and corporations seems to have no good foundation. It would seem that in both cases such an Act is fully within the legislative power, and the advisability of its existence is something with which the courts have no concern. The right to contract, which a man has, is not property, and taking it away in a given case, where it appears to the Legislature that the contracting parties are not on an even footing, would seem to be perfectly constitutional; i. e., it is difficult to see what clause in the Constitutions, as generally found to exist, would prevent it. It must be admitted, however, that there exists a tendency to favor the unconstitutionality of such Acts. See *Commonwealth v. Perry*, 155 Mass. 117 [1891].

**CONTRACTS — DISCLOSURE OF TELEGRAPHIC DESPATCH.** — The servants of the defendant company wilfully disclosed the contents of a telegram sent by plaintiffs, who sued to recover the penalty prescribed by a statute requiring messages to be "transmitted with impartiality and without discrimination." *Held*, that a fair construction of the statute would not warrant its application to such a case as this; especially since other statutes existed which expressly provided for recovery of suitable damages by the aggrieved party in case of wilful disclosure, and rendered such disclosure criminal. *Western Union Tel. Co. v. Bierhaus et al.*, 36 N. E. Rep. 161 (Ind.).

The case seems to show a just construction of the statutory provisions, and contains no discussion of the rights of parties in such a case in the absence of statute upon the subject.

**CONTRACTS — SERVICES — RECOVERY FOR PART PERFORMANCE.** — X, the maker of a note which had been indorsed by the defendant and subsequently taken up by the plaintiff, contracted by the plaintiff to work for him for a specified time in payment of the note. X subsequently refused to complete his term of service. *Held*, that while the plaintiff could not recover from the defendant on the note, he had a right of recovery against X for breach of contract, and was not bound to compensate him for services performed before breach, either under contract or upon a *quantum meruit*. *Timberlake v. Thayer*, 14 So. Rep. 446 (Miss.).

The latter propositions seem to be required by previous decisions in the State, and seem also in harmony with the weight of authority elsewhere. See Keener, *Quasi Contr.*, 215, and cases there cited.

**CRIMINAL LAW — CONCURRENT JURISDICTION.** — The defendant, a pilot on the Hudson River, was convicted of manslaughter on an indictment charging him with having, by wilful negligence, guided his vessel into a yacht, causing the death of a person on the yacht. *Held*, that the State courts have concurrent jurisdiction over the



offence, not being ousted by Rev. St. U. S. § 711, giving to the United States courts exclusive jurisdiction over crimes cognizable under authority of the United States. *People v. Welch*, 36 N. E. Rep. 328 (N. Y.).

This affirms 26 N. Y. Supp. 694. Section 711 is construed to refer only to offences against the United States which are not offences against the State, while section 5328 reserves to the State courts concurrent jurisdiction over the act if it constitute at once an offence against the United States and against the State. This construction seems best, to reconcile the sections concerned.

**EQUITY—COPYRIGHT—AUTHORITY OF EQUITABLE PART-OWNER.**—Suit in equity to restrain defendant from prosecuting an action at law for infringement of a copyright. Defendant Falk, a photographer, had taken the photograph of an actress, as a public person in costume, and copyrighted it, the understanding being that the actress was to have as many pictures, free of charge, as she desired, to do with as she chose. At the request of the orator, the actress gave the orator several of these photographs, which he published in his paper, with her consent, but without the consent of defendant, who brought an action at law against him, under Rev. St. U. S. § 4965, which imposes a penalty for publishing copies of any copyrighted work without the consent of the proprietor first obtained in writing, signed in the presence of two witnesses. *Held*, no right to the orator as a defence in equity not available in law, and he must therefore be left to make his defence at law. *Press Pub. Co. v. Falk*, 59 Fed. Rep. 324 (N. Y.).

The orator contended that the actress, although not the legal owner of the copyright, had a beneficial right in it sufficient to authorize her to permit the publishing of the copies. The court disposed conclusively of this contention by saying that even were it sound, yet, as her consent was not in writing and attested as required by the statute, it was of no effect. The court intimate that if the actress had so procured the publication of the article containing the copies, it would have been hers, and that her equitable right would doubtless have protected her and others employed by her; citing *Laurence v. Dana*, 2 Amer. Law T. Rep. (N. S.) 402.

**EQUITY—INJUNCTION RESTRAINING REMOVAL OF COUNTY SEAT.**—In this case a taxpayer, owning large property interests in the vicinity, instituted proceedings in equity to restrain the removal of the county seat, on the ground of fraud in the election, which resulted in favor of such removal. There was no statutory authority for legal intervention. *Held*, by the majority of the court, that the orator had no such interest in the subject-matter as gave him a standing in the court, and that, in the absence of statute, the court could not interfere (see 35 Pac. Rep. 586). Stiles and Hoyt, JJ., dissented to both propositions, and the present report contains a lengthy dissenting opinion by the former, with a full citation of authorities. *Parmeter v. Bourne et al.*, 35 Pac. Rep. 586, 757 (Wash.).

**EVIDENCE—CRIMINAL ACTS OTHER THAN THOSE CHARGED.**—On the trial of defendant for the murder of an infant which he had received from its mother upon an agreement to adopt it, it was shown in evidence that he had received other infants upon similar agreements, and that several infants had been found buried in his garden, where the infant for whose murder he was being tried, was found. *Held*, that this evidence was admissible, being relevant to show that this particular act complained of was designed and not accidental. *Makin v. Attorney-General for New South Wales* [1894], App. Cas. 57 (Eng.).

The doctrine of the case is similar to that of *Commonwealth v. Robinson*, 146 Mass. 571. These cases show the incorrectness of the oft-quoted statement that in a trial for one crime, evidence of other crimes committed by defendant cannot be given. Such evidence is clearly admissible when restricted to its proper use. For a somewhat extreme application of this doctrine, see *Frazer v. State*, 34 N. E. Rep. 817 (Ind.). See also 7 HARVARD LAW REVIEW, 309.

**EVIDENCE—JUDICIAL NOTICE.**—On an appeal from a decision declaring a contract void, as in violation of the Interstate Commerce Act, — *Held*, that as Kansas City and Wichita were large and universally known commercial centres of the country, the court would take judicial notice of their geographical location, and that transportation by railroad from those places was over lines outside the State of New York. *Parks v. Jacob Dold Packing Co.*, 27 N. Y. Supp. 289.

The above case is undoubtedly in accordance with the law. It is to be distinguished from the case of *Kearney v. King*, 2 B. & Ald. 301, decided in the Court of King's Bench in 1819, and the class represented thereby. For in that case, the refusal of the court to take judicial notice of the fact that a bill of exchange, headed "Dublin, May 1st, 1816," was drawn at Dublin in Ireland, was on the ground that the court could not

know that there was but one Dublin in the world. In the principal case, however, to call the Interstate Commerce Act into operation, it was only necessary to show that, under the contract, it was contemplated that goods should pass through a foreign State; and as there were no cities in the State of New York of the name of Kansas City, or Wichita, it was matter of common knowledge that goods in passing from those cities must come within the operation of the Act.

EVIDENCE — REFORMATION OF DEED FOR MISTAKE. — *Held*, that a court of equity will reform a deed conveying a quit-claim interest in land, upon proof that the parties to it intended to pass a life estate only. *Deischer et ux. v. Price et al.*, 36 N. E. Rep. 105 (Ill.).

The law is undoubtedly as above stated. Courts of equity reform deeds when upon outside evidence it appears that they are founded upon mistakes as to material facts. *Chamberlayne's Best on Evidence*, 219.

NATIONAL BANKS — INSOLVENCY AND RECEIVERS — ALLOWANCE OF CLAIMS — COLLATERAL. — Creditors of a national bank, in proving their claims, cannot be required to allow credit for collections made after the date of the declared insolvency. The receiver of a national bank objected to the claim of a creditor, on the ground that money collected on collateral, (1) before and (2) after proving its claim, should be credited to the claim. *Held*, the effect of the national bank act is that, after suspension, the right which the creditor had to levy an execution to satisfy his judgment is exchanged for an interest in the assets held by the receiver. This interest is fixed by the full amount of his debt at the time of the declared insolvency, and is not affected by any subsequent reduction of the debt. *Chemical Nat. Bank v. Armstrong*, 59 Fed. Rep. 372 (Ohio).

The question is a new one in the Federal courts, and is carefully considered both on principle and on the authorities. The weight of authority in this country and in England supports the decision on the point that no credit can be required for collections made after proof of claim; but the only English case cited holds the contrary as to payments made before proof, and the cases in this country are divided. As the learned judge points out in his opinion, there seems no good reason for distinguishing the cases.

PARTNERSHIP — BANKRUPTCY — EARNINGS OF PERSONAL SKILL. — The bankrupt carried on business in partnership as a dentist. *Held*, that his business returns were not personal earnings within the meaning of the rule which allows a bankrupt to retain personal earnings, and therefore, such returns passed to the assignee in bankruptcy. *In re Rogers* [1894], 1 Q. B. D. 425 (Eng.).

The line lies somewhere between the case of a bone-setter, of an actor, or a singer, "whose earnings depend really upon the personal exertion of the bankrupt, and on nothing else," and the case of a surgeon-apothecary, who sells medicines, or of an architect, who sells plans, or, as in the present case, of a dentist, who has a stock-in-trade and assistants, and whose earnings, although largely the result of personal skill, form the basis of a partnership agreement.

PARTNERSHIP — WHO ARE PARTNERS. — A was to furnish a house for a shooting-gallery. B was to fit it up, furnish the necessary apparatus, and manage the business. The profits were to be divided. *Held*, the portion of profits going to A was purely a compensation for the use of his house. He would have to bear no losses. Such a contract is not one of partnership. *Pullam v. Schimpf*, 14 So. Rep. 488 (Ala.).

The contract was simply for a lease, the rental to be determined by the profits made out of the shooting-gallery. It was well settled that such an agreement does not constitute a partnership. *Holmes v. R. R. Co.*, 5 Gray, 58. Whether a given contract is one of partnership is in a close case a most difficult question, and no test can be given, from a practical point of view satisfactory. *Cox v. Hickman*, 8 H. L. C. 268, laid down the doctrine that participation in profits is not a conclusive test. The case of *Walker v. Hirsch*, 27 Ch. D. 460, indicates that even a sharing in both profits and losses does not necessarily involve a partnership. It is said in *Parsons on Partnership* (4th ed.), § 46: "Parties become partners only by agreeing to enter into an association which the law regards as a partnership. . . . Whether such an association is intended to be formed is a question of fact in each case. . . . The formation of a partnership is the creation of a body apart from the partners, for business purposes, for which the partners are to act and not directly for each other." This test, which makes a partnership depend on the intention to create an entity, and not on mere incidents of the relation like profit-sharing, is the only one which will reconcile the cases. Moreover, this entity view is expressly recognized by some of the best considered recent cases, *Meehan v. Valentine*, 145 U. S. 611; and is certainly the only one in harmony with the intention of business men. *Bank v. Thompson*, 121 N. Y. 280.



**REAL PROPERTY — CONDITION SUBSEQUENT IN GRANT — WHAT CONSTITUTES A BREACH.** — A conveyance of land contained an express condition that a certain portion of the land should remain a street, and that no building should ever be permitted thereon. A strip of this portion, sixteen inches in width at one end and two inches in width at the other, was built upon, through an honest mistake as to the boundary lines. *Held*, such breach is insufficient to work a forfeiture. *Rose v. Hawley et al.*, 36 N. E. 335 (N. Y.).

However desirable the conclusion reached in this case may be, it seems difficult to support on sound principles of law. The action brought in the courts below was ejectment, founded on a breach of a condition subsequent in the deed. The opinion in the Court of Appeals is based on the ground that the breach of the condition is not substantial enough to warrant the conclusion that it was within the intention of the parties that it should cause a forfeiture. Admitting this to be true, it is a purely equitable defence, which might be conclusive if advanced in a Court of Equity to relieve against a forfeiture at law, but it cannot be considered a good legal defence. If courts of law will give effect to express conditions only when, in their opinion, the breach is substantial, it would seem that there is not much protection to be gained by the insertion of such conditions in a deed. The court say that this was not "within the intention of the parties;" it would seem that if the parties included an express condition in the terms of their deed, their intention, so far as concerned a court of law, was that it should not be broken at all. The court here make it a question of degree, which it should not have done. It would seem very doubtful whether even equity would relieve against the breach of this condition. In 4 Kent's Comm. 130, we find that "the general rule formerly was that the court would interfere and relieve against the breach of a condition subsequent, provided it was a case admitting of compensation in damages. But the relief according to the modern English doctrine in equity is confined to cases where the forfeiture has been the effect of inevitable accident, and the injury is capable of a certain compensation in damages." Here we find no accident, and damages could not be recovered.

**REAL PROPERTY — CONSTRUCTION OF WILL — VESTING OF FUTURE ESTATE.** — A provision in a will read as follows: "I loan to my wife, during her natural life, all my residuary estate, and my wish is that the property I have loaned to her be sold after her death, and the proceeds equally divided among my four children, or their lawful heirs begotten of their bodies." *Held*, the gift to the children vests immediately, so that an assignment by one during the widow's life is valid. *Chapman v. Chapman*, 18 S. E. Rep. 913 (Va.).

This is in line with the policy laid down in *Seller's Ex'r v. Reed*, 88 Va. 377, of favoring the vesting of interests at the testator's death. The authorities are discussed in 2 Jarman on Wills (5th Am. ed.), 458.

**REAL PROPERTY — RIPARIAN RIGHTS.** — Under authority of the territorial legislature, the appellants built and maintained a dam across a navigable stream. Later, the city of St. Paul, also authorized by the legislature, took for its water supply the water of a lake which empties into the river above the dam. The appellants maintain that material damage had been done thereby to their water-power, and ask for a perpetual injunction. *Held*, that the rights of a riparian owner on a navigable stream are subordinate to public uses, and the water may be applied to such without compensation for damages; drawing a supply for the ordinary use of cities is such a public use, and is not subject to the rules which obtain between riparian owners. *Minneapolis Mill Co. v. Water Com'rs. of St. Paul*, 58 N. W. Rep. 33 (Minn.).

The extension of the meaning of a public use in accord with the decision of the Massachusetts court in the first *Wutuppa Pond* case, 147 Mass. 548, which is mentioned in the opinion. The true ground of the decision seems to be that the State owns the bed of the stream, and not that the stream is navigable, though this does not clearly appear. Navigability alone would hardly support the result reached here.

**REAL PROPERTY — WILLS — NATURE OF ESTATE** — Certain deposits had been made by the testator in various savings banks, in his daughter's name. He bequeathed these deposits, with various other property, to her, subject to an executory devise, and the question is whether the daughter must hold what is her own property before the bequest subject to the defeasance. The court *held* that she must, as "to accept the benefit while she declines the burden is to defraud the design of the donor. . . . The conscience of the donee is affected." *Kuykendall v. Devocmon et al.*, 28 Atl. 412 (Md.).

This is a question of construction, and doubtless the result is in conformity with the intention of the testator. There seems to be no reason why a court cannot say there is an implied condition, although the testator does not use the word "condition," or separate the daughter's property from the rest bequeathed.

**TORTS—CONSPIRACY—TO INJURE BUSINESS.**—"The Retail Lumber Dealers' Assn.," by its by-laws, gave an active member a claim against a wholesaler for selling to a person not a "regular dealer" in such member's community, and required members to refuse to patronize a wholesaler who ignored the committee's decisions. Plaintiff, who was not a "regular dealer," underbid defendant on a contract; but wholesalers refused to sell to him, and he was obliged to abandon the contract because defendant, an active member of the association, had previously enforced a claim against a wholesaler who had sold to plaintiff, and expressed an intention of continuing to enforce such claims. *Held*, that defendant was liable for the amount which plaintiff lost by abandoning his contract, and would be perpetually enjoined from making a claim under the by-laws of the association against any person who sold to plaintiff. *Jackson et al. v. Stanfield et al.*, 36 N. E. Rep. 345 (Ind.).

The court in an able opinion review the authorities of the several States, and reach the sound conclusion that "the great weight of authority supports the doctrine that where the policy pursued against a trade or business is of a menacing character, calculated to destroy or injure the business of the person so engaged, either by threats or intimidation, it becomes unlawful, and the person inflicting the wrong is amenable to the injured party in a civil action for damages therefor" (p. 351).

**TORTS—DECEIT—MEANS OF KNOWLEDGE.**—Defendant falsely represented to plaintiff that he had a good title to a certain land. Plaintiff, relying on this, entered into a contract with defendant. *Held*, a bill to rescind the contract is not defeated by the fact that plaintiff could have ascertained the falsity of defendant's representation by examining the registry records. *Baker v. Maxwell*, 14 So. Rep. 468 (Ala.).

The defendant admits that he lied, but says that the plaintiff was a fool to believe him, and therefore ought not to be given a remedy. This ought not to be a defence. Of course a representation may be such that no man will rely on it, and many cases apparently contrary to the doctrine laid down above were probably decided on the ground that plaintiff did not act in reliance on the representation. But the representation here was one calculated to put the purchaser off his guard, — to induce him not to look up the title, and to prevent him from using his means of knowledge. It is submitted that the plaintiff had a right to take the defendant at his word, and that the decision should be supported at law as well as in equity. For a good discussion of these principles, see 1 Bigelow on Fraud, 527, 530; *Cottrill v. Krum*, 100 Mo. 397; 2 Bish. New Cr. Law, §§ 433-436, and § 464.

**TORTS—IMPUTED NEGLIGENCE.**—In an action for injuries to the plaintiff's wife, caused by the negligence of the defendant company, it was *held*, that in a State where the wife had been released of all common-law liabilities, and the husband of all responsibility for the wife's torts, her contributory negligence would not bar his action. *Honey v. C. & Q. Ry. Co.*, 59 Fed. Rep. 423 (Iowa).

None of the authorities cited in this opinion refer to actions for loss of services, and the case rests wholly on the idea that the right of action in behalf of the husband is not derived from the wife, but originates in an injury to the husband's own right. The rule in 1 Shearman and Redfield on Negligence, § 71, for which authority is there cited, covers this case, leads to a more just result, and seems sounder on principle: "When a parent or master sues, for his own benefit, to recover damages for the technical loss of services of a child or servant, . . . any contributory negligence of the child or servant which would suffice to bar an action brought in his name will also preclude a recovery by the parent or master."

**TORTS—LIABILITY OF CHARITABLE INSTITUTION FOR TORTS OF ITS SERVANTS.**—*Held*, that a purely charitable institution established by the State is not liable to its inmates for the negligent or malicious acts of its servants. *Williams v. Louisville Industrial School of Reform*, 24 S. W. Rep. 1065 (Ky.).

There is a conflict of authority on the point here decided. *McDonald v. Massachusetts General Hospital*, 120 Mass. 432, is in accord with the principal case; *Galvin v. Rhode Island Hospital*, 12 R. I. 411, *contra*.

**TORTS—LIBEL—PRIVILEGED COMMUNICATION.**—The defendant newspaper published an article charging the plaintiff, a candidate for nomination, with selling himself to an opposing candidate. *Held*, that this communication is not privileged as concerning a servant, or one applying for service; that privilege extends to fair comment and criticism of the acts of public men, but not to false allegations of fact. *Post Pub. Co. v. Hallam*, 59 Fed. Rep. 530 (Ohio).

The court argues that where, as in this case, the sacrifice of private rights outweighs the public benefit, privilege should cease. *Davis v. Shepstone*, 11 App. Cas. 187, and American cases following it, are cited with approval. The decision contains a good exposition of the basis of privilege, and seems justifiable.



## REVIEWS.

**THE LAW OF PARTNERSHIP.** By Theophilus Parsons, LL.D. Fourth edition, revised and enlarged by Joseph Henry Beale, Jr., Assistant Professor of Law in Harvard University. 8vo. Little, Brown, & Co. 1893.

The striking feature of the new edition of this work is the complete presentation of the entity theory of partnership, a doctrine which has heretofore received insufficient recognition from the text-writers. This doctrine, though unqualifiedly rejected in some of the more conservative jurisdictions, has received such development in many quarters that a presentation of the law of partnership starting from this comparatively modern view has become highly desirable, and the more so from the fact that the reluctance of many courts consciously to accept this view, and, in fact, their frequent denial of its validity, while at the same time making a decision which can only be supported on the theory rejected (see 7 HARV. LAW REV. 426), makes this subject one of the most perplexing branches of the law to one who puts dependence on the authorities. To have such a book as Professor Beale's new edition of Parsons will be invaluable to the champions of the mercantile theory, for this view is taken as the basis of the law on the subject in the editor's additions to the original work. The historical explanation of cases is always necessary when settled legal principles undergo a radical change; no marked deviation from the scope of the former editions was, however, required in this case, for with singular prescience Professor Parsons said (2d ed., p. 3): "Even in this country, at the present time, perhaps something would be gained if, when new questions in partnership arise, the courts looked for assistance in giving an answer to the existing system of the law of partnership, which, if it does not provide in advance for all possible questions, contains within itself principles that, generally at least, will suggest the proper answers. And if they fail, and an absolutely new question demands an absolutely new answer, it will be safer to look to the reason and justice of the case, *and the usage of merchants if there be one*, than to remote and disconnected branches of law, resembling partnership in some respects, but differing from it in still more."

In the new edition the original scheme has been followed. The infrequent additions to the text are distinguished by being enclosed in brackets, and the editor's notes, amplifying, extending, and modernizing the text, and illustrating it with all the recent decisions of importance, are indicated by numbers. The theoretical change in the law required the rewriting of the first and fifth chapters, on "The Definition and Nature of a partnership" and "Who are Partners,"—additions which are thoroughly in the spirit of the original work. Chapter XIX., "Of Part-Owners of Ships," has been omitted, and its substitute is a comprehensive chapter on "Business Combinations and Trusts," of such brevity and lucidity as to form an admirable supplement to the strict law of partnership. There is, besides, an appendix with forms for articles of partnership.

The function of the text-book of to-day is performed by an exhaustive collection of authorities, which, by supplementing Professor Parsons's text, should make this the standard book for the profession on the law of partnership.

C. P. H.

**THE LAW OF CONTRACTS.** By Theophilus Parsons, LL.D. Eighth edition, edited by Samuel Williston. Boston: Little, Brown, & Co. 1893. 3 volumes, royal 8vo, pp. cclxiii., 632; xx., 929; ix., 718.

The chief reason for the present use and value of this much-edited text-book is, apparently, the magnificent comprehensiveness of its scope. Surely one could nowhere else find in the same book treatises on Fire Insurance and Sales, Damages, and Statutes impairing the Obligation of Contracts; and surely it must often be most convenient to the lawyer to be able to handle the whole of a case about contract without going to the separate treatises on the various subdivisions of the law. Such being the nature of the book, which reached a sixth edition under the supervision of the author himself, the duties of the editor of this edition, Professor Williston, whose work is really the only portion of the book now properly the subject of review, have naturally confined themselves to the addition of good new cases, the excision of obsolete or unnecessary old ones, and the supplementing of the text upon certain points of law not therein treated to an extent sufficient for the present needs of the profession.

The first two pieces of the work have been most satisfactorily done. Avoiding, on the one hand, the useless collection of "all the cases," and on the other hand, any too great brevity of citation, Professor Williston has succeeded, as a test of the book will show, in giving a ready and sufficient key to the case law, and, further, by shutting out quotations from authorities now somewhat stale, in doing this without materially increasing the size of the book.

The third part of the editor's work, the revision of the text-book itself, has been very conservatively done. Recognizing the difficulties in the way of altering the text of a much-cited book, he has practically confined his work to supplementary notes, carefully distinguished from those of Professor Parsons by the arrangement of the type. Some of these—for instance, those upon subscription-papers, divisible contracts, and the completion of contracts by mail—are excellent expositions of difficult points of law. Others appear to be too conservative. What there is of them is good; but the text seems constantly to need more supplementing, more explanation, and especially more contradiction, than the editor has supplied. This, however, is cause for regret rather than for complaint, and in such cases the profession doubtless prefer not to see an old text edited out of sight.

R. W. H.

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**A SELECTION OF CASES ON THE LAW OF CONTRACTS.** By Samuel Williston. Volume II. Boston: Little, Brown, & Co. 1894. 8vo, cloth or sheep. pp. 618.

This book is a supplement to Professor Langdell's Cases on Contracts, and will form a second volume to a single one to be compiled from the present two parts of that work. The book contains not only cases upon those parts of the law already treated by Professor Langdell, supplementary to his cases, and for the greater part decided since 1879, the date of the last edition of his book, but also cases upon other branches of the law of contracts not touched upon in it.

The new subjects deal with the legality of contracts, their discharge, and the assignment of rights of action under them. There are a few pages in the beginning completing the subjects of rights of action condi-



tional upon performance, and of impossible contracts; but the body of the book is rather devoted to the limitations of the contractual relation either from its content or the action of the parties, than to its formation or fulfilment. Suits of this nature are more common certainly than those with regard to mutual assent or consideration, and probably than those which concern rights of action dependent upon performance; so that those who demand a more evident and rapid return from their time will find this book a welcome addition to the course in this school. The chief differences between this volume and its predecessors are that here the great preponderance of English authority has not been preserved, and that the cases are, as a rule, much more recent.

With this addition of cases, a book of which the last edition is now fifteen years old becomes, without revision, quite as valuable as it ever was; while a text-book depends for its value upon constant revision of the conclusions contained in it, as well as upon the addition of cases. This is a fortunate accident of a method which offers to the student a chance to do his own thinking, in preference to working out his own conclusions for him.

B. L. H.

CAR TRUSTS IN THE UNITED STATES: THE LAW OF CONTRACTS OF CONDITIONAL SALE OF ROLLING STOCK. By Gherardi Davis and G. Morgan Browne, Jr. New York, 1894. 8vo. pphlet, pp. 49.

One of the most interesting things in the common law is the way in which men under the exigencies of new forms of business will sometimes seize hold upon a little used branch of the law, adapt it to their purposes, and develop it almost into a subject by itself. This very good treatment of the law of "Car Trusts" shows how the desire of railway companies to get rolling stock which they cannot pay for, and the desire of other people to secure payment in the future by a right against the rolling stock itself, have caused a use of the law of conditional sale of which the courts of a few decades ago would never have dreamed.

The authors recommend the careful investigation and consideration of the terms of each contract, and the refinements of words upon which some courts have gone far in basing distinctions show that the recommendation is a good one. The Supreme Court of the United States, for instance, has decided a case in favor of an unregistered conditional sale where registry of mortgages was required by law, upon the express distinction that the words of the parties provided that "title, ownership, and possession" were not to pass, not caring that the first thing the parties did was to pass possession (118 U. S. 663; and cf. 136 U. S. 268). One wonders how they would deal with an instrument which provided that compliance with the statutory requirements of registration should be a condition precedent of any right in the vendee; and one does not wonder that an ingenious bridge company thought it could keep its lien on a bridge sold, to be affixed to the realty, as against a prior known mortgage covering the whole roadbed. Apart from these vagaries of refinement, the ordinary ironclad car trust, well-considered forms for which are given in the appendix, seems to the authors to furnish a sufficient protection to the holders of car-trust certificates.

R. W. H.

**THE FEDERAL CASES.** Comprising cases argued and determined in the Circuit and District Courts of the United States, 1789-1880. Book I., Aalesund-Arthur; Cases 1-564 inclusive. St. Paul: West Publishing Co. 1894. Royal 8vo, sheep. pp. xlvii., 1224.

**TABLES OF CASES.** 1. Numerical Table [showing where any case cited may be found in advance of its publication in the Federal Cases]. 2. Table of Citations [giving the reference to the Federal Cases for any case cited from the reports which these cases are intended to supercede]. St. Paul: West Publishing Co. 1894. Royal 8vo., paper. pp. vii, 365.

This, as the first volume, contains complete tables of the circuits under different statutes, of judges, and of reports and reporters, which are very valuable, and not to be found elsewhere.

The case law of the United States Circuit and District Courts prior to the date of the establishment of the Federal Reporter is at present nowhere to be found in a state fit for ready use, and the exigencies of such reporting as has been done have confined both reports and their use to the several districts and circuits, or to the publications of particular branches of the law, such as bankruptcy and patent rights. And, as a result of this, the Circuit and District judges and the practitioners in their several courts have not had the great benefit which should come from a knowledge of what is going on within co-ordinate jurisdictions. The Federal Reporter has done away with difficulties for the future, and the Federal Cases now seek to put the past in a form really accessible and ready for reference.

In this, to judge from the part of the work so far published, the success has been most gratifying; the deficiencies of the publishers have been avoided, and all their merits have told heavily. Thorough preparation, successful search for new cases not reported in ordinary form, and careful and well-considered arrangement of the matter originally reported by such men as Story and Blatchford, have all contributed to a work which will surely be popular and often be necessary.

R. W. H.





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## ILLUSTRATIONS OF THE ORIGIN OF *CY PRÈS*.

THE remark of Lord C. J. WILMOT in the great case of Attorney-General *v. Downing* in 1767,<sup>1</sup> that "the Court thought one kind of charity would embalm the testator's memory as well as another," and his reference without apparent disapproval to the case of *Da Costa v. Da Paz*,<sup>2</sup> then recently decided, but since so generally repudiated as an authority,<sup>3</sup> seemed to approve the greatest latitude in the application of the doctrine of *cy près*, at a time when more reasonable limits were beginning to prevail. As, however, appears from the context, it was rather an historical résumé; and shortly states in a concise form the prevalent mediæval notions out of which the doctrine of *cy près* in the law of charities was developed, — notions, as we shall see, striking with deepest root into the soil of mediæval society from the earliest period.

The statute of 43 Eliz. c. 4, which, while it did not originate,<sup>4</sup> codified the law of charitable trusts in its day, and became a sort of Magna Charta of that branch of the law, enumerated the following objects as the only ones which either directly or by analogy were good charitable uses, namely, gifts: —

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<sup>1</sup> Wilmot's Notes, I. 33; 1 Jarm. Wills, \*243 n.

<sup>2</sup> Amb. 228.

<sup>3</sup> Jackson *v. Phillips*, 14 Allen, 539, 575; Minot *v. Baker*, 147 Mass. 348, 351.

<sup>4</sup> Stat. 2 Hen. V. c. 1, provided for impotent poor, lazars, &c.; 12 Rich. II. c. 7, and 1 Hen. VII. c. 7, for scholars in universities; 1 Edw. VI. c. 14, for piers and jetties; 2 & 3 Edw. VI. c. 5, for walls and bridges.



"For relief of aged, impotent and poor people, for maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and scholars in universities; for repair of bridges, ports, havens, causeways, churches, sea-banks and highways; for education and preferment of orphans; for or towards relief stock or maintenance for house of correction; for marriage of poor maids; for supportation aid and help of young tradesmen, handicraftsmen and persons decayed; for relief or redemption of prisoners or captives, and for aid or ease of any poor inhabitants concerning payment of fifteens, setting out soldiers, and other taxes."

This statute was passed in 1601, following an earlier act of 1597;<sup>1</sup> but it may be new to many to find in the famous early English poem of the "Vision of Piers Plowman" an enumeration of charitable objects so full and so closely similar to that of the act, that it seems as if the Protestant Parliament of Elizabeth had borrowed the great church-reforming poet's verses for the staple of their enactment. The poet enjoins men to —

"Save their wynnyng  
And amende meson-dieux [hospitals] theremyd;  
And wikkede [weak] weyes wightly amende;  
And mys-eise folke helpe;  
And do boote to brugges [bridges] that to-broke were;  
Marien maydenes, or maken hem nonnes;  
Povere peple and prisons fynden hem hir foode;  
And set scolers to scole, or to some othere craftes;  
Releve religion, and renten hem bettere." <sup>2</sup>

This was written in 1377, and an earlier version (in substance identical) in 1362,<sup>3</sup> nearly two hundred and forty years before the act of Elizabeth, but at a period when, if Protestantism were not yet born, the dry bones of the Church were being stirred by the mighty wind of reform, and by popular resistance to clerical abuses; when John Langland's poetry was as potent as Wiclif's Scriptures; and the Statutes of Provisors and Præmunire ensured to England a safe foothold for resistance to Papal aggressions. The differences between the statute and the poem are as significant as their similarities; for while the "meson-dieux" and "helpe of mys-eise folke" in the poem answer more or less exactly to the "relief of sick and maimed soldiers, aged, impotent and poor people" in the statute; "do boote to brugges that to-broke were," "and wikkede weyes wightly amende," to the "repair of bridges, causeways, and

<sup>1</sup> 39 Eliz.    <sup>2</sup> vv. 4515-4528, Wright ed.    <sup>3</sup> Passus VIII. vv. 27-39, Skeat ed.

highways; " "set scolers to scole," to the "maintenance of schools of learning, free schools and scholars in universities; " "or to some othere craftes," to "the supportation, aid, and help of young tradesmen; " "povere peple and prisons fynden hem hir foode," to the "relief and redemption of prisoners or captives, and for aid and ease of any poor inhabitants; " yet the "releve religion" of the poem is narrowed in the act to the "repair of churches; " and the "marien maydenes, or maken hem nonnes" is shorn of the latter clause by the Protestant legislature of the daughter of Tudor King Harry; as indeed it would hardly have become them to have treated that as a charity which her father had regarded as treason, or to have peopled the convents which he had broken up.

While, however, as we shall shortly illustrate, the law of charities had its main roots in the religious notions of the mediæval period, it would be a mistake to look exclusively to the religious or moral side of charity for the origin of our law. "Undoubtedly," says a distinguished jurist,<sup>1</sup> "in one sense charity may be defined to be all the good affections which men ought to bear to each other; but, before the matter becomes the subject of legal cognizance as a charity, there must be a gift to a general public use. This may in some cases embrace the rich as well as the poor."<sup>2</sup> There is, indeed, but a slight difference in the eye of reason between such property as is devoted to charity and that which is given to ordinary public uses."<sup>3</sup> Indeed, the most remarkable point to notice is, how far even some of the objects enumerated by Langland as charitable are of a strictly public character, and by no means limited to the poor, sick, or suffering. Such are the repair of bridges and highways. The necessity of these to a civilized society was certainly keenly felt in the middle ages, probably at no period more so. It was fully appreciated that there was no more important factor towards the security of trade and travel, the development of business and of all the agencies of civil or social improvement, than these nerves of national life; and to their construction and amelioration every incitement was given.<sup>4</sup> But the idea of treating the performance of these public duties as acts of charity did not come originally from the Church, nor from her religious or even moral re-

<sup>1</sup> Dwight, J., arg. Rose Will Case, p. 92.

<sup>2</sup> Amb. 651.

<sup>3</sup> Dwight, *ubi supra*, p. 66. "Neque multum inter se differunt sacerdotium et imperium, neque res sacræ a rebus communibus et publicis." Just. Nov. 7.

<sup>4</sup> Thus on the bridge at Witham is inscribed, "And the blessid besines is brigges to make." Besant's London, p. 66.



quirements. It was an inheritance from the Roman law,<sup>1</sup> undoubtedly entering into England, as other parts of the Roman law did, through the Church (or rather through churchmen), but not from what we may call its religiously charitable side. As is well known, under the code of Justinian full provision was made for the enforcement of charitable duties, not only by the bishop, but on the complaint of any citizen as representing the public exactly as the Attorney-General now represents them; and that perpetuities and the application of *cy près*<sup>2</sup> were allowed; and as this code came into England through the civilians the public duty stood side by side with the moral and religious as a proper charitable work, which the Church would regard as such.

The limits of this article are too narrow to permit us to trace in any just degree the growth of these two elements of the law of charities as administered by the Church. Suffice it to say that the alms-giving which in the first ages of Christianity had been the natural expression of its spirit and its habitual practice was, we might say, constantly stated by the Fathers as a just ground in the sight of Heaven for its pardon of our trespasses. "After baptism," says Cyprian, "we would have no resource to expiate our continual faults, if the divine compassion had not taught us works of justice and pity as a way of safety, and alms as a means of washing out the stains of our vices." Said Clement of Alexandria: "As many poor as are relieved, so many advocates for you before the Sovereign Judge." And Chrysostom: "Whatever may be thy sins, fear not; thy alms outweigh them all in the balance of the Judge."

As this voluntary alms-giving was organized under direction of the Church into an established system of charity, the objects of public duty inculcated, protected, and enforced under the Roman law fell, as we have said, also under its control. All was fish that came to the net of the successor of Saint Peter; and having disposal of the merits of Christ and the saints, upon which he, as the head of the Church, could draw as upon a bank,<sup>3</sup> the view rapidly prevailed that a remission of sins and exemption from their consequences was worked not only by acts of observance towards the Church, but of charity towards men. It is certainly true that

<sup>1</sup> Pandects, Lib. 30, Tit. 1, §§ 117, 122; Lib. 32, Tit. 2, § 5; Lib. 33, Tit. 1, § 6.

<sup>2</sup> Dig. Lib. 33, Tit. 2, § 17; even in its prerogative form, Lib. 50, Tit. 5, § 4; Wil-mot's Notes, 1. 33; Jackson v. Phillips, 14 Allen, 539, 575.

<sup>3</sup> Clement VI.; Migne, Nouv. Encyc. Theol. xxvii. 123, 124; Southey, Book of the Church, i. 310.

the former class largely predominated; but it is equally true that the latter were recognized as to some extent efficacious.<sup>1</sup> One needs to go but little way into the documentary history of the period from the fifth to the fifteenth centuries of our era, to find abundant examples of the way in which men bought their peace with Heaven by the surrender of temporal goods in life; or, by devoting these after death *in pios usus*, sought to escape the pains of Purgatory or the clutches of the devils that literally darkened the air about the deathbed of the departing sinner. That it was a deliberate purchase, and that they had not the slightest hesitation in clearly describing it as such, amply appears from the terms employed. Thus the charter of King Offa to the cathedral church at Worcester, A. D. 774,<sup>2</sup> begins: —

“In nomine Sanctæ Trinitatis. Ait enim Apostolus; ‘Nichil intulimus in hunc mundum, nec auferre quid possumus;’ et beatus Job; ‘Nudus egressus sum ex utero matris et nudus revertar in terram.’ Quapropter ego, Offa, rex anglorum, brevitatem vitæ ejus considerans, et quod cum his caducis mercanda esse eterna polorum regna, donabo,” etc.

It seems indeed odd that the king should decry his own title and disparage the quality of his goods when offering them as consideration for his purchase — *mercatio* — of the joys of the heavenly kingdom; and we must rather impute these terms to the monkish grantee’s mode of persuading the monarch to part with his property by belittling it; for without any doubt the charter was penned by the priest and not by the king, who was probably scarcely, if at all, able to write. So in Ethelbald of Mercia’s grant to Evesham Abbey, A. D. 716,<sup>3</sup> it is said: “Caducis opibus celestis vitæ præmia mercari queamus;” in Offa’s charter to Duddon, A. D. 776:<sup>4</sup> “A P 8 Regnanti in perpetuum domino nostro. Jhesu Christo, Universa quippe quæ hic in præsentia visibus humanis corporaliter contemplantur nihil esse nisi vana et caduca transitoriaque ex sacrorum voluminum testimoniis verum patet, Et

<sup>1</sup> “The public utility of bridges caused them to be included in the somewhat elastic term of ‘pious uses.’ Thus in 1310, at Toulouse, Mathieu Aylchard is released from wearing crosses and performing certain pilgrimages on condition of contributing 40 livres tournois to a new bridge then under construction.” Lea, *Hist. Inq.* i. 474. Jusserand, *Eng. Wayfaring Life*, ch. 1, gives many instances. See Besant’s *London*, ante.

<sup>2</sup> 1 Birch Sax. Cart. 303.

<sup>3</sup> Ib. 198.

<sup>4</sup> Ib. 320.



tamen cum istis caducis bonis æternaliter, sine fine mansura, alta polorum regna et jugiter florentis paradisi amœnitas mercari a fidelibus viris queunt;" and again in his grant to the see of Worcester, A. D. 780:<sup>1</sup> "Et quod cum his transitoriis eterna mercari possunt." The almost blunt simplicity of the transactions is refreshing; they seemed to entertain no fear that the eternal price would not be paid for their "caduca," "transitoria," "mundana" bona. Instances of similar language could be multiplied indefinitely. The priestly hand in these cartularies comes out even more plainly in reinforcing the grant with a blessing and a curse at the end,—the former for those who respected it; the latter for those who interfered with it, and couched in denunciatory terms that seem to send a reverberating echo of the thunders of the Church down through the long lapse of centuries to our own day. It is a pity our conveyancers have nothing to compare with this vigorous rhetoric:—

"Qui vero minuere et per antiquam si supervenerit cartulam elidere temptaverit [says the deed to Wlhun, Bishop of Chichester, A. D. 931<sup>2</sup>], sciat semet ipsum novissima examinationis die, classica Archangeli clangente buccina, cum Juda impiæ proditiōis compilatore, infaustis quoque Judæis Christum ore sacrilego blasphemantibus æterna dampnatione, edacibus favillantium tormentorum flammis esse periturum."

So in the deed of Athelstane to Sherborne, A. D. 933:<sup>3</sup>—

"Si autem, quod absit, aliquis diabolica deceptus fraude hanc meæ liberalitatis breviculam in aliquo elidere vel impugnare temptaverit, sciat se die tremendæ districtiōis ultima, clara reboante Archangeli voce, cum Juda proditore, qui a satoris pio sato "filius perditionis" dicitur, æterna damnatione edacibus indicibilium tormentorum flammis arsurum."

All the terrors of the Day of Judgment are thus invoked on the head of the disturber, but almost always with the significant saving clause: "nisi prius digna satisfactiōe emendare voluerit," that is, buys his peace at a rate to be fixed by the Church.

Nor was this purchase of heaven by any means limited to royal grantors, or to donations of land. Throughout the whole fabric of society the same principle obtained, and constantly there were made in testators' wills provision for the endowment of hospitals,

<sup>1</sup> 1 Birch Sax. Cart. 327, 329. So Caducalla to Wilfrid, A. D. 680; ib. 81.

<sup>2</sup> 2 Birch Sax. Cart. 315, 316.

<sup>3</sup> Ib. 392. Athelstane seems particularly fond of this form of imprecatory sanction. See numerous instances, ib. pp. 318-390.

doles to the poor, erection or repair of churches or chapels therein, or at times even for the marriage of poor maidens, for relief of prisoners, repair of ways, or other objects subsequently included in the statute, side by side with the more direct provisions for the testator's security after decease by masses, candles, torches, obits, knells, months minds, and the like; by which the intercession of the Church and of the saints was bought, and the active agencies of the fiends were averted. As an illustration let us take the will of Joane, Lady Bergavenny, dated January 10, A. D. 1434.<sup>1</sup> It begins: —

“ Purposing, with the leave of God to dispose of such goods, as his grace hath lent me, in such use as might be to his plesauns, and profit to my soul, and all theirs that I am bounden to, I will that every parish church that my body resteth in a night, after it passeth from the place of my dying, be offered two cloths of gold and if it rest in any College or Conventual Church three cloths of gold and in every Cathedral Church, that the dean, abbot or prior have vi s, viii d. and every canon, monk, vicar, priest or clerk that is at the dirige at the mass in the morning shall have xii d; also I ordain that anon after my burying there be done for my soul five thousand masses in all the haste that they may goodly; and I bequeath to the house of said friars at Hereford in general ccc marks to find two priests perpetually to sing for my Lord my husband, my Lord my father, my Lady my mother and me. And I bequeath each friar of the same house in special for the day of my burying to pray for my soul iii s, 4 d; and I devise c marks to be ‘dalt pene-mêle’ or more after the discretion of my executors among poor men and women that come to my burying; and I ordain and devise to have five priests to sing for me twenty winters; and that of the most honest persons and good conversations that can be found. Moreover I devise cc marks to be departed among my poor tenants in England; also I devise c pounds to be disposed of within half a year after my death among bed rid men and other poor people dwelling in the lordships that I have; and also I devise that Bartholomew Brokesby and Walter Kebyll be every year at Hereford the day of my anniversary, seeing that my obit with the remnant of the obsequies be done in due wise to the profit of my soul, spending about the execution thereof at every time x pounds after their direction. Moreover I devise to the marriage of poor maidens dwelling within my lordships c pounds, and to the making and amending of ‘fabul brugges’ [feeble bridges] and foul ways c pounds; and to the finding and deliverance of poor prisoners that have been well conditioned xl pounds,” &c.

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<sup>1</sup> Nicolas, Test. Vet. i. 224.



Robert Fabyan, retired merchant of London, and the well known chronicler of England, by his will dated July 11, 1511,<sup>1</sup> bequeaths —

“my soule to the infynite mercy of our Saviour J’hu Crist, and to the prayers and tucion of his moost blissid moder our Lady Seynt Mary, blissid Seynt Cristoffer, myn advowry [patron or advocate]; my corps to be buried atwene my pewe and the high awter within the qwere of the parisshe church of Alhalowen of Theydon Garnon, in the shyre of Essex; at which tyme of burying and also at the monethis mynde I will that myn executrice doo cause to be carried from London xii new torches to burne in the times of said burying and monethis mynde, and also that they do purvay iv tapers of iii lb evry pece to brenne about the corps and herse for the forsaid ii seasons; which iv tapers I wyll be holden at every tyme by foure poore men, to everych of them I wyll there be geven for their labours at either of the said ii tymes iiiii d to as many as been weddid men, and if any of theym happen to be unmarried, then they to have but iii d. apece.”

And so on, detailing with delightfully minute — if slightly tedious — particularity the trentals to be sung, by whom, and how much to be paid. He then continues: —

“vi preests to be present at myn burying and six masses to be sung; oon of requiem, oon a masse of the v wounds [of the Saviour] the iii<sup>d</sup> a masse of thassumpcion of our Lady, the iv<sup>th</sup> a masse of all martirs, with a speciall memory of Seynt Christoffer; the v<sup>th</sup> a masse of all confessours with a speciall memory of Seynt Nicholas; the vi<sup>th</sup> a masse of all virgyns with a speciall memory of Seynt Dorothe;”

thus securing the special advocacy of these three powerful saints; for of the saints of that day it might be said as of the deacons of ours: “All were good, but there were odds in saints.”

“To the either of which preests I bequeth and everych of them v d with condicioun, that at the time of the lavatory everyche of theym turne theym to the people and exorte theym to pray for the soules of Robert Fabyan and his children,” &c.,

enumerating a dozen more favored “soules” by name. Divers further bequests provide for the masses, &c., at xiii d. for each church; for a —

“knyll to be rongyn at my monethes mynde after the guyse of London, and that myn executrice doo assemble upon the said day of monethes

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<sup>1</sup> Nicolas, Test. Vet. ii. 498.

mynde xii of the porest menys childern of said parisshe, the said childern to be ordered aboute my grave, and there knelyng to say for my soule and all Cristen soules De Profundis &c; to the which xii children I will be given xiii d, that is to meane, to the childe that begynneth the De Profundis ii d, and to everyche of the other i d."

Space forbids our giving much more of this microscopic will; but no general description would convey an idea of the minute and formal care with which every detail is set forth to ensure the prompt, punctual, and exact performance of this necessary custody of his departed "soule," so justly as his own words. To "make assurance doubly sure," there follow the most precise directions for the food to be provided for the mourners at the burial and "monethes mind," viz.: —

"competent brede ale and chese," "pieces of beffe and of moton," "xxiv treen [wooden] platers and xxiv treen sponys, with xxiv d of silver to be given unto xxiv poor persons of the saide parisshe of Theydon Garnon;" "and if my said monethes mynde fall in Lent or on a fysshe day, then I will that said xxiv peces of fleshe be altered [substitution, and not miraculous conversion being intended] unto saltfyshe or stokfyshe, unwatered and unsodeyn. [Also] to be ordeyned in spice bred vi d, and in white bennys [beans] xii d, and a kylderkyn of goode ale with viii d of chese to refresshe all comers to that obite. If it happen the said obite to fall in Lent, than I will, that for the peces of beeff aforesaid and for the chese be ordeyned pyes of elys or som other goode fyshe mete to the value of the said ii s viii d."

And so he proceeds for a dozen more pages, near the conclusion "dropping into poetry," which to the extent of nine formal verses was to "be graven at the feete of the figurys," carved on his "litell tumb of freestone," — the "figurys" being —

"ii. of a man and a woman, with x men children and vi women children [presumably his family], and over and above the said figurys I will be made a figure of the Fader in Heven inclosed in a sonne; and from the man figure I will be made on rolle toward the said figure of the Fader, and in hit to be graven O. Pater in celis; and from the figure of the woman another lyke rolle whereyn to be graven, Nos tecum pascere velis."

Not less illustrative of the times is the will of Thomas Wyndesor, dated August 13, 1479,<sup>1</sup> providing carefully for his funeral and "months mind;" enjoining on his executors to have —

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<sup>1</sup> Nicolas, Test. Vet. i. 352.



"four tapers and twenty two torches of wax, every taper to contain the weight of ten pounds and every torch sixteen pounds, which I will that twenty four very poor men and well disposed shall hold; and that every of said twenty-four men shall have for his labor at both times viii d and a gown of frize [we should think these well earned]; and that there be one hundred children, each within the age of sixteen years to say our Lady's Psalter for my soul, each of them having iiii d. for his labor;"

directing also doles to poor, and the hiring an —

"honest and well disposed priest to sing and say service during the term of twenty years after my decease and to have for his wages vi £ xiii s. iv d and find himself."

The only other will which space permits our citing is that of Sir Thomas Lyttleton, the great oracle of the law, dated August 22, 1481.<sup>1</sup> After bequeathing his soul to the three persons of the Trinity, "and to our most Blessed Lady and Virgin, Saynt Mary, moder of Our Lord and Jesu C<sup>h</sup>rist, the only begotten sonne of our saide [sic] Lorde God, the Fader of Heven, and to Saint Christopher, the whiche our saide Lord did truste to bear on his shouldres," and prescribing that immediately after his decease "myn executors find three gode preests to singe three trentals for my soule and that everich such preest have right sufficiently for his labor," he gives —

"one hundred shelings by yere to the Priour and Covent to singe at the altar, hallowed for the worship of St George and St Christopher, daily at vii in the morning for the soules of my fader and moder and for the soule of William Burley, my fader in lawe, and for the soule of Sir Philip Chetwin [his wife's first husband], and for all soules that I am most bounden to pray, and specially for myn own soule after my deceasse, and that whenever the covent sing the annual Placebo and Dirige, and Requiem for my soule, that they have vi s. viii d. for thyr disport and recreation."

And after various gifts, doles, and charities, he enjoins on his executors to —

"do their diligent labor to se that my will be performed, the which, as they know wele, the performing thereof in godely hast and tym, that shall be to the hasty remedie of my soule; and the long taryng thereof, is to the retardation of the meritts of my soul."

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<sup>1</sup> Nicolas, Test. Vet. i. 362.

Through all these wills, as through all the mediæval testaments, sounds the keynote of salvation by church agencies at a price. Every one of these is paid for, "for the health of my soul." Nor was it confined to wills or the donations of individuals. In many of the statutes the same form obtains, and "charitable deeds to be done by their executors for the health of their souls" [thrice repeated], and that "debts remain unpaid to the great damage and perils of the souls" of the testators is the staple and burden of these enactments even as late as the reign of Henry VIII.<sup>1</sup> This peril of the soul was no mere phrase to them; it meant the active agency of real fiends, whose grotesque, misshapen, and frightful figures taxed the utmost inventions of art to depict; who swarmed about the death-bed, and whose audacity knew no limits,—not even the soul of the Virgin mother being exempt from their attacks; and which only the immediate and most strenuous efforts of the guardian angel and saints could repel. Mediæval art in sculpture, church-stall, and missal abounds in representations of these conflicts. As was early taught by the Fathers<sup>2</sup> the air was full of devils; one inhaled them in the act of sneezing; was beset by them in the visions of the night, or in unfrequented wastes by day; or might precipitate their malevolent agency by a wicked or even a thoughtless word.<sup>3</sup> The blessed Reichelm, abbot of Schongau about the year 1270, had received the gift of being able to discern the aerial bodies of these creatures,<sup>4</sup> and often saw them as a thick dust, or as motes in a sunbeam, or as thickly falling rain. Perhaps to-day science would call them bacteria, microbes, or bacilli. At the death of the monk of Hemmenrode we are informed that fifteen thousand demons gathered together.<sup>5</sup> In the famous poem, the "Prick of Conscience," by Richard Rolle, the Hermit of Hampole, which enjoyed unbounded popularity in the fourteenth century, the picture is drawn in lurid colors:—

"For when the lyf sal pas fra a man,  
To ravissche the saul with them away  
Als wode lyons thai sal than fare  
And grymly gryn on hym and blere  
Thai sal fande at hys last endyng  
Through thretynges that thai sal mak

Devils sal gadir about hym than  
To pyne of Helle if thai may  
And rampe on hym & skoul and stare  
And hydus braydes make hym to fere.  
Hym into wanhope for to bringe  
And through the ferdnes that he sal tak."

<sup>1</sup> Stat. Hen. VIII., ch. 4; 1 Stat. Realm, p. 285.

<sup>2</sup> Origen, Sup. Jesu Nave, Homil. xv. 5, 6.

<sup>3</sup> Lecky, Rationalism, i. 40, 47, 89; Lea, Hist. Inquisition, iii. 380.

<sup>4</sup> Caesarius Heisterbach, Dial. Dist. iv., v., xi. 17; xii. 5.

<sup>5</sup> Ib.



It is no wonder that the death-bed was their favorite scene of action; for then the soul, issuing like a homunculus from the body, started on its fearful pilgrimage,<sup>1</sup> naked and defenceless, unless the offices of celestial beings, promptly invoked by prayers, knells, masses, doles, and votive offerings, came swiftly to its assistance. Hence the pathetic injunction for haste which is the constant refrain of testators. Besides the expressions in the wills above quoted, Ralph Lord Cromwell<sup>2</sup> enjoins that "three thousand masses be said immediately after my decease;" Elizabeth Lady Fitzhugh,<sup>3</sup> "in all the goodly haste that it may be." Thomas Earl of Salisbury,<sup>4</sup> "one thousand masses so soon as possible after my death." Elizabeth Lady Latimer directs,<sup>5</sup> "St Gregory's great trental to be said for me incontinent after my decease in all goodly haste possible." Elizabeth Countess of Salisbury:<sup>6</sup> "three thousand masses with all speed after my death." Joane Lady Hungerford commands<sup>7</sup> "all possible speed." Anne Duchess of Buckingham,<sup>8</sup> "in all haste;" and instances of like injunctions and prayers might be multiplied indefinitely. Burial in consecrated ground, especially in the church itself and near the altar or to the chapel of some patron saint, was indispensable in the first instance, but by no means sufficed for complete protection. Sir Thomas Wyndham, knight and courageous sailor,<sup>9</sup> —

"trusts that the blessed mother of Christ will, in my moost extreme nede of her infinite pitye, take my soule into her hands, and hit present unto her moost dere sonne. Also to the singular mediacions and prayers of all the holy company of hevyn, aungells, archaungells, patriarches, prophets, apostels, evangelists, martyrs, confessoures, and virgynes, and specially to myn accustomed advourys, I call and crye; Saint John Evangelist, Saint George, Saint Thomas of Canterbury, Saint Margaret, Saint Kateryn, and Saint Barbara, humbly beseche you, that not only at the hour of deth soo too ayde, socour, and defend me that the auntyent & goostly enemy, nor noon other yll or dampnabell spirite have power to invade me, nor with hys tereablenes to anoye me."

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<sup>1</sup> Hence the Viaticum derived its name, when the priest saying "Accipe Viaticum corporis Domini," etc., added "hoc est sacramentum corporis Christi quod erit tibi in via hac qua gradieris robor et fulcimentum, et ambulabis per Dei gratiam in fortitudine cibi illius usque ad Montem Dei." Sarum use, quoted in Maskell *Ritualia Eccl. Angl.* i. ccxxix.

<sup>2</sup> Nicolas, *Test. Vet.* i. 276.

<sup>5</sup> *Ib.* 361.

<sup>8</sup> A. D. 1480; *ib.* 356.

<sup>3</sup> *Ib.* 212.

<sup>6</sup> *Ib.* 183.

<sup>9</sup> Octo. 22, A. D. 1521; *id.* 2, 579.

<sup>4</sup> *Ib.* 216.

<sup>7</sup> *Ib.* 181.

And he then provides for the consideration to be paid:—

“And I will have immediatlie after my decesse, as shortly as may be possible, a thousand masses to be saide within the cite of Norwich and other places within the Shire of Norfolk; whereof I will have in honor of the blessed Trinitie one hundreth, in honor of the five wounds<sup>1</sup> of our Savyour J’hu Christ one hundreth, in honor of the five joys of our blisshed Lady one hundreth, in honor of the nine orders of Aungells one hundreth, in honor of the Patriarchs one hundreth, in honor of the twelve Apostells one hundreth, in honor of all Saints one hundreth; of Requiem one hundreth, in honor of St John the Evangelist thirty; in honor of St George forty, in honor of St Thomas of Canterbury thirty, in honor of St Margaret forty, in honor of St Katernyn thirty, and of St Barbara thirty.”

It is not wonderful therefore that no bounds were set to the efforts to escape the “tereablenes of the yll and dampnabell spirite,” and that the Church’s intervention should be purchased at any price. Thus Lord Bergavenny’s will, April 25, 1408,<sup>2</sup> directs that “ten thousand masses be said for my soul with all possible haste after my death, by the most honest<sup>3</sup> priest that can be found.” Joan Lady Cobham, August 13, 1369, wills<sup>4</sup> that seven thousand masses be said for her soul by the canons of Tunbridge and the Friars, Preachers, Minors, Augustines, and Carmelites of London, who for so doing shall have xxiv*℥* iiis. & iv*d*. Robert Lord Hungerford<sup>5</sup> provides for “a thousand priests saying the exequies of the dead, commendations, and the seven penitential

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<sup>1</sup> This particular subject of commemoration was a favorite one. Hence the number “five” was constantly used for the number of tapers about the coffin. See wills of Edmond Earl of March, Nicolas, Test. Vet. i. 110; William Lord Ferrers, ib. 76; William Earl of Suffolk, ib. 114; Robert Earl of Suffolk, ib. 73; James Lord Audley, ib. 117; Sir J. Montacute, ib. 124; Lady Elizabeth Audley, ib. 152; Margaret Countess Warwick, ib. 169; Elizabeth Lady Despenser, ib. 174; Elizabeth Countess of Salisbury, ib. 183; William Lord Bergavenny, ib. 171; Isabel Countess of Suffolk, ib. 193; Thomas Duke of Exeter, ib. 207; Thomas Lord St. John, ib. 214.

<sup>2</sup> Nicolas, Test. Vet. i. 171.

<sup>3</sup> This requirement is very significant. It occurs repeatedly; see will of Lady Despenser, Nicolas, Test. Vet. i. 174; William Lord Roos, ib. 182; Elizabeth Countess of Salisbury, ib. 183; Sir J. Nevil, ib. 264; John Duke of Exeter, ib. 255; Ann Duchess of Exeter, ib. 281; Joan Lady Clinton, ib. 284; William Lord Bergavenny, ib. 171; Sir H. Stafford, ib. 324; John Lord Marney, id. 2, 626; Sir Piers Edgcomb, ib. 647; Thomas Lord Dacre, ib. 653. Its frequency indicates strongly that the priestly fraternity were not above suspicion to say the least. Cardinal Beaufort, in his will, Nicolas, Test. Vet. i. 249, even provides that the prior, etc., of Canterbury should give security.

<sup>4</sup> Nicolas, Test. Vet. i. 81.

<sup>5</sup> Ib. 294.

psalms;" while Richard Fouler<sup>1</sup> propitiates St. Romwold, in the aisles of whose church he was to be buried, by directing that:—

"a new tombe or shrine for the saide saint, where the old is now standing, be made curiously with marble, and upon the same that there be set a coffin or chest curiously wrought and gilt as it appertaineth for to lay the bones of the said saint in; and this all to be done at my cost and charge."

It is also noticeable that this was felt as a legal obligation in favor not only of the testator but of his connections, and was discharged *ex debito justitiæ*. Thus Katherine Lady Hastings, Nov. 22, 1503,<sup>2</sup> provides that a priest shall sing "for my fadyr, and my lady my modar, my lord my husband's soule for my soule and for all Christian soules; and in special for those soules which I am most bounden to cause to be prayed for." "For all for whom I am most bounden to pray," says Sir Thomas Lyttleton,<sup>3</sup> the judge; including under that term, by a sort of collateral warranty, his wife's former husband. So Joane Lady Bergavenny, in the will already quoted from,<sup>4</sup> refers her pious bequests as made "for the profit of my own soul and all theirs I am bounden to," whom a later enumeration shows to be her husband, father, mother, etc.; and Elizabeth Lady Abergavenny provides for a priest to pray for all her four husbands, enumerated by name.<sup>5</sup>

No means were neglected to defeat the machinations of the "auncient and goostly enemy of mankind." Chief perhaps among these agencies were relics. It would require volumes to do justice to this subject. We can only point out in passing that the efficacy of these was so absolutely automatic that it mattered not how their possession was obtained. A stolen body, arm, leg, bone, or tooth of St. Denis,<sup>6</sup> St. Nicolas,<sup>7</sup> or Venerable Bede,<sup>8</sup> was as efficacious for the thief as for the true owner. Nay, such was their potency that people were healed by them against their wil. Thus a twelfth-century chronicler piously narrates that when in the year 887 the relics of St. Martin of Tours were brought home from Auxerre, two cripples of Touraine, who earned an easy livelihood

<sup>1</sup> Nicolas, Test. Vet. i. 344.

<sup>3</sup> *Supra*, p. 78.

<sup>2</sup> Id. ii. 450.

<sup>4</sup> *Supra*, p. 75.

<sup>5</sup> Will Apr. 24, 1500; Nic. Test. Vet. ii. 444.

<sup>6</sup> See Translatio S. Dionysii, Pertz Mon. Germ. Hist. xiii. 343.

<sup>7</sup> Odericus Vitalis, ii. 384 (Bohn ed.).

<sup>8</sup> Simeon of Durham, ap. Bede's Works, Int. xxi, xxii.



by beggary, on hearing of the approach of the saintly bones, counselled together to escape from the territory as quickly as possible, lest the returning saint should cure them, and thus deprive them of their claim on the alms of the charitable. Their fears were well founded; but their means of locomotion were insufficient, for the relics arrived in Touraine before they could get clear of the province, and they were cured in spite of themselves.<sup>1</sup> The belief in the genuineness of relics, as in their efficacy, was universal. Besides numerous pieces of the true cross, all authentic, — so numerous that a house or ship of respectable size could have been constructed from them, — we find, among other gifts by testators, Henry VII. devising “the precious relic of one of the legs of St George, set in silver, parcel gilt,” etc.;<sup>2</sup> and William Hante, May 9, 1462, bequeathing “one piece of that stone on which the angel Gabriel descended when he saluted the blessed Virgin Mary,” as well as “one piece of the bone of St Bartholomew to the church at Waltham, and a piece of the bone of St Nicholas to the church of Augustine Friars.”<sup>3</sup>

The motley crowd which was drawn to any one of the shrines containing these wonder-working relics was often found more numerous and variegated than desirable. The sacred spot more often than not resembled a fair or a circus, and the sharper, mountebank, or thief, found a favorable opening for the exercise of his talents; while the jongleur's strains or the performance of miracle play, or morality, entertained the throngs of credulous believers. It was no wonder, therefore, while very illustrative of the times, that when the excellent St. Thierry, former prior of Grammont, was interred, his sensible successor by mingled adjurations and threats compelled the sacred remains to desist from miracle-working, as sure to bring disorder and disrepute upon the locality which was devoted to monastic repose and the quiet of religious contemplation.<sup>4</sup>

The supply of relics naturally increased as the demand for them grew, and multiplication of an individual relic was always possible and sometimes necessary. Thus the accommodating Saint Teliau adjusted happily the conflicting claims of three parishes, each of which insisted on the right to inter him as a native of its district, by simply multiplying himself into three, and in this way giving each church a separate body to bury.<sup>5</sup> So we find two bodies of

<sup>1</sup> Lea, *Hist. Inq.* i. 47.

<sup>2</sup> March 31, 1509; *Nic. Test. Vet.* i. 31.

<sup>3</sup> *Ib.* i. 300.

<sup>4</sup> Lea, *Hist. Inq.* i. 38.

<sup>5</sup> Fuller, *Church Hist.* i. 64.

St. Denis the Areopagite, one at Paris and one at Ratisbonne, and each equally authentic;<sup>1</sup> four "vernicles" or sacred handkerchiefs of St. Veronica, each with the original imprint of our Saviour's face upon it;<sup>2</sup> two heads of St. John Baptist, one at Amiens and one at Constantinople, as we learn from the worthy Sir John Mandeville,<sup>3</sup> who was left thereby in grievous perplexity which to adore. St. Mark is found to have no less than sixteen legs in different places;<sup>4</sup> St. Catherine of Sienna also was, as Howells observes, "one of the best distributed saints on the calendar;"<sup>5</sup> and the "verray true cross," which was found by the Empress Helena in A. D. 318, and distributed all over the world before 347 A. D., still existed unimpaired in Jerusalem A. D. 383, and was there worshipped by Paula, the companion of St. Jerome.<sup>6</sup> In fact the supply originated from the demand; and sacred objects which had not been known to exist for centuries suddenly started into being when the ascendancy of Christianity was established under Constantine in the fourth century; and not only the pillar to which Christ was bound,<sup>7</sup> with the imprint of his hand therein, made when the stone miraculously softened to receive it three centuries before, was found to glad the eyes of the faithful; not only did the milk dropped from the bosom of the Virgin still whiten the stones of Bethlehem after a lapse of five centuries,<sup>8</sup> and the hairs torn from her head at the Crucifixion, reappear after ten;<sup>9</sup> but even the dunghill whereon sat the patient man of Uz, the pit into which Joseph had been cast,<sup>10</sup> the pillar of salt of Lot's wife, hay from the sacred manger,<sup>11</sup> and crystallized tears shed by the Virgin Mother<sup>12</sup>

<sup>1</sup> Pertz, Mon. Hist. Germ. xiii. 343, &c.

<sup>2</sup> Xavier's Pers. Life of Christ gives three, one each at Rome, Milan, and Jahen, in Portugal. There was one at Lucca, Piers Plowm., v. 3997 *n*. It is worthy of remark, that as late as 1529 Sir Thomas More relies on the authenticity of the vernicle to justify the worship of images. Dyaloge, p. 354.

<sup>3</sup> Voyage et Travail, 107, 108.

<sup>5</sup> Tuscan Cities, 162.

<sup>4</sup> F. P. Cobbe, "Italics," 273.

<sup>6</sup> Conder, Syr. Stone Lore, 280.

<sup>7</sup> Seen by Eucherius, A. D. 427-440. Conder, *ubi supra*.

<sup>8</sup> John of Hildesheim ap. Chester Myst. 289. It was still seen by the Seigneur d'Anglure in the fourteenth century. Jusserand, Eng. Wayf. Life, 401. See also Ellis Orig. Lett. 3d Series, iii. 107; Hare, Walks in Rome, ii. 125.

<sup>9</sup> Odericus Vitalis, iii. 179, who himself had two of the hairs. See Hare, *ubi supra*, for a choice collection of relics.

<sup>10</sup> B. de la Brocquiere (Early Trav. Palestine, 300, Bohn). So Fra Alex. Ariosti di Bologna, A. D. 1450; apud Civezza Missioni Franciscani (Rome, 1861), v. 673. Della Valle, June 15, 1616, says, "ma io sto in dubbio."

<sup>11</sup> John of Hildesheim, Chester Myst. 300.

<sup>12</sup> Bertrand de la Brocquiere, 340.

emerged from the dim shades of a remote antiquity, defying the relentless touch of time, and drew crowds of credulous and adoring pilgrims to behold them.

The policy of the Church early availed itself of this infatuation, and found a fruitful source of revenue in the composition for the penance of a pilgrimage to these holy shrines. As, during the Crusades, the relief of the holy city and land was the object which stimulated all Christendom to enthusiastic effort, at times amounting to frenzy, and to the most lavish expenditure of blood and treasure, so both before and after these military efforts to rescue the sacred shrines from the dominion of the misbeliever, a pilgrimage to Jerusalem had even from the earliest day<sup>1</sup> enured to the satisfaction or atonement for sin. Indeed the Crusades themselves largely grew out of the interruption to these pilgrimages, which Hakim, the mad Caliph of Egypt, and later the Seljukian conquest of Jerusalem had occasioned; and, when the extinction of the Latin kingdom had made the journey too perilous for the most adventurous, a composition was accepted in lieu thereof by the pope. Similar beneficial efforts followed, though in a less degree, from a resort to Rome or the scarcely less famous shrines of Compostella in Spain, or, in England, of our lady of Walsingham or the tomb of the martyr Becket at Canterbury; and when the dying penitents could not themselves perform this pious duty a like benefit accrued from its vicarious performance by another, either a volunteer or one who was hired for the purpose. In the same accurate repository from which we have drawn so many illustrations of testamentary charity we find several instances of this practice. Thus William Lord Beauchamp, by will dated January 7, A. D. 1269,<sup>2</sup> gives "to Walter my son signed with the cross for a pilgrimage to the Holy Land on my behalf, and of Isabell, his mother, two hundred marks." Humphrey de Bohun, A. D. 1361, provides for a priest to go as pilgrim to Jerusalem;<sup>3</sup> Sir Richard Arundel, July 8, A. D. 1417,<sup>4</sup> directs that "my executors find one man who for the good of my soul shall go to the court of Rome, to the Holy Land, to the Sepulture of our Lord, &c.;" William Ponte, in A. D. 1471,<sup>5</sup> bequeaths "to any of those who will pilgrim-

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<sup>1</sup> Conder, *Syr. Stone Lore*, 279-287.

<sup>2</sup> Nicolas, *Test. Vet.* i. 50.

<sup>3</sup> Nichols, *Royal Wills*, p. 54: also to Pontefract to the tomb of Thomas Earl of Lancaster.

<sup>4</sup> Nicolas, *Test. Vet.*, i. 196.

<sup>5</sup> *Ib.* 326.



age for me to St Thomas of Canterbury 12d;” and Katharine of Aragon, in A. D. 1528, provides,<sup>1</sup> “Item that for my soul some personage go to our Lady of Walsingham in pilgrimage and in going by the way dole xx nobles.” The magnificently mendacious Sir John Mandeville, in 1362, in taking leave of his confiding readers, after his marvellous detail of imaginary travels and fabulous monsters, invokes from heaven the benefit of his wayfaring upon them.<sup>2</sup> In consequence a class of professional pilgrims and palmers grew up whose distinctive badges were the staff and scrip, and in case of a pilgrimage to Jerusalem, the palm; or if they had visited Compostella, the scallop-shell. Statutes were passed for the protection of the pilgrims’ families in their absence. Thus an early law in Scotland provided:—

“Gif any burges is passed in pilgrimage with license of the kirk and of his neighbors to the Halie Land or to Saint James or to any other Halie place his house and all his haill proper familie sall be in the peace of the king and of the provost and baillies until God bring him home again.”<sup>3</sup>

The abuses and excesses, however, to which pilgrimages led, soon produced restrictive acts, and by statutes 5 Rich. II., c. 1, § 2; 12 Rich. II., c. 7,<sup>4</sup> a license was required; of which many instances are to be found in Rymer’s *Fœdera*;<sup>5</sup> and by an ordinance of Charles VI. of France, pilgrimage to Rome was entirely forbidden.<sup>6</sup>

The sale of pardons and indulgences from Rome was a traffic long known, and the trade of the pardoner was carried on from a very early day.<sup>7</sup> It was a purchase for money very thinly disguised, and generally not disguised at all. Thus the Marquis Berkley, in his will Feb. 5, 1491,<sup>8</sup> provides that his executors shall—

<sup>1</sup> Nicolas, *Test. Vet.* i. 36.

<sup>2</sup> *Voiage et Travaile*, 316: “I make hem partneres and graunte hem part of alle the gode pilgrimages . . . that I have don.”

<sup>3</sup> *Regiam Majestatem*, p. 126.

<sup>4</sup> Jusserand, *Wayf. Life Eng.* pp. 361, 362, 367.

<sup>5</sup> *Ib.* p. 367; Rymer, *Fœd.* vii. p. 468.

<sup>6</sup> *Recueil d’Isambert*, vi. 843.

<sup>7</sup> As *Hudibras* says, i. 1495,—

“With crosses, relics, crucifixes,  
Beads, pictures, Rosaries, and pixes,  
The tools of working our salvation  
By mere mechanic operation.”

<sup>8</sup> Nicolas, *Test. Vet.* 2, 407.

"purchase a pardon from Rome as large as might be had for plain remission of sins of all those who shall be confessed and contrite at Long brigge from evensong to evensong at the feast of the Trinity, and there say paternosters and three aves for my soul," &c.

But this business was carried on on a much larger scale. Years of jubilee were ordained to be celebrated at Rome, whereto the pious pilgrim resorting should receive for his journey a remission or indulgence of sin, in greater or less measure. Such were the great jubilee of Boniface VIII. in 1300, and that of the exemplary Borgia, Alexander VI., in 1500. To all those who were unable to attend in person the further grace was extended in this latter case,<sup>1</sup> that, upon payment of a commutation in money to the well-beloved deputy and special ambassador of the Pope, the right reverend father in God, Jasper Pon, he in return would "absolve of all maner of crimes, trespasses, transgressions, and sins whatsoever," excepting only conspiring against the Pope, forgery of his bulls, or assaulting bishops or higher officials of the Church. The tariff charged is exactly stated at the end of this interesting document, and is graduated on the rental of the offender. The ostensible purpose was to obtain funds for a crusade against the Turks, a well-worn pretext, which was employed by Borgia's successor, Leo X. It is perhaps needless to say that the money was never so applied, and it was only the secular arms of Hunniades, Sobieski, or Corvinus, or the unfeed services of the Knights of St. John at Rhodes and Malta that were found to rescue Christendom from the victorious hordes of Mahomet and the navies of Solyman.

The growing addiction to the superstitious worship of relics and idle pilgrimages, with their gross excesses and inevitable liability to perversion and abuse, through the vicious practice of a money commutation<sup>2</sup> or of an indulgence sold at a price,<sup>3</sup> thus doubly defeating the true action and natural objects of charity, early received the animadversion of those who sought to reform the Church

<sup>1</sup> See this indulgence in full text, Lett. Rich. III. and Hen. VII. ii. 93. It was Clement VI., circa 1350, who first formulated the treasury of merits theory. Jusserand, Eng. Wayf. Life, 311; Migne, *Nouv. Encyc. Theol.* xxvii. 183-184.

<sup>2</sup> Lea, *Hist. Inq.* i. 40-47; 471-480. And this was enforced against the estate of a heretic after death, sometimes after a lapse of three or four generations. *Ib.*

<sup>3</sup> It was condemned by Pope Boniface IX. See Bull of 1390 against pardoners who sell indulgences from vows for pilgrimages, but take small sums which they do not remit; concluding "*Horret et merito indignatur animus talia reminisci.*"

Baronius *Annales Eccl. Raynaldi, continuatio*, vii. 525. Jusserand, Eng. Wayf. Life, 435.

from within. In his tract "About Images and Pardons" (circa 1383), Wicliff says:<sup>1</sup> —

"But we spekyn over litel for to visete and offre to pore men; and maken broken briges and causeis [causeways] where men and bestis and catel perischen ofte. But gif any man foolily avowen to go to Rome or Jerusalem, Canterbury or other pilgrimadis that we chargen more than the grete avowe maad of our Christendom to kepe Goddis hestis and forsake the fend and alle his warkis. For though men breken the hieste commaundementis of God the lewideste [most ordinary or humblest] parissche preest schal assoile anoon; but if the founden vowis maad of our oure owene heed, many time agenus Goddis wille, noman schal assoile, but greet worldly bischopis, or the most worldly preest of Rome, the emperors maister, and Goddis felawe, or God upon earth; and they wolen not dispense with these vowis, but gif they han the cost that men schulden make inward and outward."

So Langland, among the motley crowd that throng the "fair feeld" of life describes<sup>2</sup> the

"Pilgrymes and palmeres, pligheten hem togidere,  
For to seken seint Jame, and seintes at Rome.  
They wenten forth in hire wey, with many wise tales,  
And hadden leve to lyen al hire lif after.  
I seigh some, that seiden, thei hadde y-sought seintes;  
To ech a tale that thei tolde, hire tongue was tempred to lye,  
Moore than to seye sooth, it seemed bi hire speche.  
Heremytes on an heep, with hoked staves,  
Wenten to Walsyngham, and hire wenches after.  
Grete lobies and longe, that lothe were to swynke,  
Clothed hem in copes, to ben known from othere,  
And shopen hem heremytes, hire ese to have.  
Ther preched a pardoner, as he a preest were,  
Brought forth a bulle, with many bisshopes seles,  
And seide that hymselfe myghte assoillen hem alle,  
Of falshede of fastynge, of avowes y-broken."

So in repeating the story of Emperor Trajan, whom he calls Trojanus, — so favorite a legend of the middle ages that Dante represents it as carved on the walls of Purgatory,<sup>3</sup> — he makes the redeemed emperor say:<sup>4</sup> —

<sup>1</sup> Works, iii. 283.

<sup>2</sup> Piers Plowman, vv. 91-142 (Wright ed.).

<sup>3</sup> Dante Purg. x. 73-93.

<sup>4</sup> Piers Plowman, vv. 6864-82 (Wright ed.).



“Clerkes wite the sothe,  
 That all the clergie under Crist ne myghte me cracche fro helle,  
 But oonliche love and leautee, and my lawful domes.  
 Gregorie wiste this wel, and wilned to my soule  
 Savacion for soothnesse that he seigh in my werkes;  
 And after that he wepte and wilned me were graunted  
 Grace; withouten any bene bidding his boone was underfongen,  
 And I saved, as ye see, withouten syngynge of masses.  
 By love and by lernynge of my lyvyng in truthe,  
 Broughte me fro bitter peyne, ther no bidding myghte.”

The poet adds: <sup>1</sup>—

“Nought thorough preiere of a pope, was that Sarsen saved,  
 But for his pure truthe, as Seint Gregorie bereth witnesse.”

Again he says: <sup>2</sup>—

“Right so if thou be religious renne thou never  
 Further to Rome ne to Rochemadour.”

Even earlier than Wiclif of Langland, the Archbishop of York, William Greenfield, had in 1313, repressed sharply the attempt to draw resort to a local shrine — Foston in Yorkshire — by setting up a claim that the local image of the Virgin had a peculiar sanctity whereby, as the prelate says,<sup>3</sup> there was a “*magnus simplicium concursus ac si in eadem plus quam in aliis similibus imaginibus aliquid numinis apparet.*”

The sturdy spirit indicated by these and like protests was not long in bearing fruit, and it is noticeable how soon more practical and public, as distinguished from selfish, superstitious, and individual, began to be the subjects of charitable devise and bequest during the fifteenth and sixteenth centuries, until they broadened into the comprehensive legislation of the Statute of Elizabeth. Thus in the will of Lady Bergavenny already referred to,<sup>4</sup> we find with the masses prescribed, donations to the Church and its priests, and provisions for the repair of the holy structures, not only doles to the poor at her burying and alms to other poor, but appropriations for the “*marien*” of poor maidens, relief of poor prisoners, and even for the practical public duty of making and amending “*fabul brugges and foul wayes.*” The poor, indeed, had always from the earliest days of Christianity been a charity, but the matters of larger public benevolence or concern were later. It is true that

<sup>1</sup> Piers Plowman, vv. 6387–90 (Wright ed.).

<sup>2</sup> B. xii. 37 (Skeat ed.).

<sup>3</sup> Jusserand, Eng. Wayf. Life, 346.

<sup>4</sup> Nicolas, Test. Vet. i. 224.

even as early as the will of Henry II., A.D. 1182,<sup>1</sup> bequests are found "towards the marriage of poor and free women of England wanting aid ccc marks of gold; towards the marriage of poor and free women of Normandy wanting aid c marks of gold and towards the marriage of poor and free women of the land of my father the Earl of Anjou c marks of gold;" but gifts for a like object do not become frequent till long after, in the fifteenth century.<sup>2</sup> So provisions for the relief of poor prisoners are found in the wills of Thomas Duke of Exeter, December 29, 1426;<sup>3</sup> Cardinal Beaufort, January 20, 1446;<sup>4</sup> William Hante, May 9, 1462;<sup>5</sup> Richard Berne, April 20, 1461;<sup>6</sup> Sir Thomas Bryan, February 7, 1495;<sup>7</sup> Sir William Fitzwilliam, May 28, 1534;<sup>8</sup> and Sir Thomas Hastings, March 28, 1558;<sup>9</sup> while the repair of ways and bridges, besides the various instances already given in wills,<sup>10</sup> is mentioned in the striking and popular poem of the Child of Bristowe,<sup>11</sup> circa 1400, —

"Largely he did hem geve, wayes and brugges for to make, —"

as an efficient means whereby the pious child ransoms the condemned soul of his avaricious sire.

We need indeed only to contrast the substantial good sense and excellent testamentary dispositions of two of the testators just named, Sir William Fitzwilliam and Lady Alice Wyche, with the wild superstitious terror of the will of Sir Thomas Wyndham, or the elaborate and selfish minuteness of that of Robert Fabyan, already given, to see how considerable an advance had been made in the direction of the statute. It is true that Lady Alice's dispositions are said to be "for my soul and other souls as aforesaid;" but besides bequests to relatives, the principal gifts are to —

"poor husbands, ploughmen of the county such as have wives and children, and poor widows, to poor householders to have every of them a milch cow and xiii s iv d and in marriage of poor maidens of good conversation in the county and in mending the highwayes cc £."

<sup>1</sup> Nicolas, *Test. Vet.* i. 2-4.

<sup>2</sup> Wills of Sir Thomas Sackville, December 1, 1432, *ib.* 221; of Cardinal Beaufort, January 20, 1446, *ib.* 249; of Lady Alice Wyche, June 16, 1474, *ib.* 336; of Henry Hatche, May 6, 1533, *id.* ii. 661; of Sir William Fitzwilliam, May 28, 1534, *ib.* 665; of Richard Foulter, 1473, *id.* i. 344; of Richard, Earl of Salisbury, May 10, 1458, *ib.* 286.

<sup>3</sup> Nicolas, *Test. Vet.* i. 207.

<sup>4</sup> *Ib.* 292.

<sup>5</sup> *Ib.* 750.

<sup>6</sup> *Ib.* 249.

<sup>7</sup> *Id.* ii. 449.

<sup>10</sup> *Ante.*

<sup>8</sup> *Ib.* 300.

<sup>9</sup> *Ib.* 665.

<sup>11</sup> Hazlitt, *Early Pop. Poetry*, i. 119, vv. 213-14.

From this general sketch of the sources and early characteristics of *cy près*, so tersely summarized in the phrase of C. J. Wilmot, with which we began this article and which had become a tradition in his day, the grounds of his succinct statement may perhaps be more clearly apparent. As, in those earlier ages, pious donations were the price paid to heaven or to its more exacting broker, the Church, for its favor; "one kind of charity" would indeed have "embalmed the testator's memory, as well as another;" for his intent was not the application of the purchase-money, but the delivery of the goods purchased. We have in fact done little more than illustrate in detail the views concisely given in the rest of C. J. Wilmot's judgment: —

"The right of the heir at law," he says, "seems to arise as naturally in this case as in any other. But instead of favoring him as in all other cases, the testator is made to disinherit him for a charity he never thought of, — perhaps for a charity repugnant to the testator's intention, and which directly opposes and encounters the charity he meant to establish. But this doctrine is now so fully settled that it cannot be departed from, and the reason upon which it seems founded is this: The donation was considered as proceeding from a general principle of piety in the testator. Charity was an expiation of sin and to be rewarded in another state; and therefore if political reasons negatived the particular charity given, this court thought the merits of the charity ought not to be lost to the testator nor to the public, and that they were carrying out his general pious intention; and they proceeded upon a presumption that the principle which produced one charity would have been equally active in producing another, in case the testator had been told that the particular charity he meditated could not take place. The court thought one kind of charity would embalm his memory as well as another, and being equally meritorious would entitle him to the same reward."

While it certainly cannot be denied that this conclusion derives logically from the origin of *cy près*, and that the testator's paramount object being salvation, the means were immaterial, yet that such a doctrine should not only have survived the state of society and of belief in which it originated, but also have been developed into an integral part of the jurisprudence of a social order and faith radically diverse, may occasion surprise. And a doubt may arise whether in administering it, the peculiar circumstances of its beginning and development — we might indeed say the necessary conditions of its existence — are borne in mind; or whether it is considered that the modern testator, not intending



a purchase of heaven with his "bonis caducis" but a specific bequest to a specific charity, may be presumed to have known not merely what he intended, but what he did not intend, in the case of a charity, as well as of any testamentary disposition made by him; or that the court in imputing to him what he did not say, because he might have said it, may not run some risk of making him say what he would have emphatically repudiated.

*Joseph Willard.*

THE RIGHT OF A THIRD PERSON TO SUE UPON A  
CONTRACT MADE FOR HIS BENEFIT.

TO ask a question with regard to the right of a third person to bring a suit upon a contract suggests that there are two others whose rights are not in doubt. The use of the words "third person" (and they are those that naturally suggest themselves), implies that we admit that the contract is between two others, and that the third is a stranger. The rights acquired under a contract belong naturally to those who make it and to their assigns. The question suggested is whether a stranger may bring an action upon a contract made between others for his benefit. The idea of a contract is an agreement between parties giving rights to one against the other, and the elements of a contract upon which an action may be maintained at common law are, the agreement, the parties, and the consideration; and it is well settled as an old rule of law that the parties to a contract not under seal are the persons between whom the consideration moves. It is clear, therefore, that it is only between the parties that all the elements of a common-law contract exist, and that as a general rule the persons to bring suit upon a contract are the parties to the agreement and to the consideration.

It was said in an English case in 1861 that there were some old cases to the effect that a stranger to a contract may maintain an action upon it if he stand in such a relation to the contracting party that it may be said that the contract was made for his benefit, but that no modern case could be found in support of such an exception to the general rule.<sup>1</sup> The rule is distinctly laid down in the best English text-books,<sup>2</sup> and no such exception is admitted to exist. In this country, on the other hand, many cases have been decided on what is declared to be "the broad principle that, if one person make a promise to another for the benefit of a third person, that third person may maintain an action upon it;"<sup>3</sup> and in the Supreme Court of the United States Mr. Justice Davis said in

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<sup>1</sup> *Tweddle v. Atkinson*, 1 B. & S. 393.

<sup>2</sup> *Leake on Contracts*, 222; *Dacey on Parties*, 82; 1 *Addison on Contracts*, \*26.

<sup>3</sup> *Per Denio, J., in Burr v. Beers*, 24 N. Y. 178.

1876, "The right of a party to maintain assumpsit on a promise not under seal made to another for his benefit, although much controverted, is now the prevailing rule in this country."<sup>1</sup>

It is important to know whether there is in fact such a difference between the law of this country and that of England on a question involving the elements of the law of contracts. Is it true that in this country it is a broad principle that if one person make a promise to another for the benefit of a third person, that third person may maintain an action upon it, and that in England the right to such an action is not admitted to exist even as an exception to the general rule that the person to sue upon a promise is the person to whom the promise was made? There may well be a difference between the two countries in the application of legal principles, or even in the modification of them by exceptions; but when there is a difference in the declaration of a general rule involving the very definition of a contract it provokes an inquiry into the principles out of which the rule should have come, and suggests a doubt whether or not there has been some mistake in the enunciation of the rule on the one side or the other.

It often happens in the development of the common law by means of precedents that some general rule is laid down in the decision of a particular case, without considering whether so general a rule is necessary for the right decision of that case, and then the decision of that case is considered as an authority for the general rule; and it is not until some other case arises in which the rule, although it plainly embraces the case, would clearly work injustice that the soundness of the rule begins to be questioned, or limitations are put upon the generality of its terms. The rules of the common law are deduced from the cases decided; but it is important not to formulate rules that are broader than is necessary to include the cases already decided, and it is particularly desirable that the judges should not declare general rules merely for the purpose of finding a ground of decision for a particular case which does not seem at first sight to fall in with existing rules of law. The rule is put in the syllabus of the report, and is repeated in the digests; then it is stated in the text-books as based upon the authority of the decision, and afterward, when it offers an easy solution of a difficult case, it is quoted by other judges upon the authority of the text-book, and so, without inquiry into its origin,

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<sup>1</sup> *Hendrick v. Lindsay*, 93 U. S. 143.



it comes to be regarded as a rule of law; and it is only when it is applied to cases in which it works injustice that the soundness of the rule begins to be questioned.

It is no doubt true that there are many cases in which an action may be brought by the person for whose benefit the contract is made; but it by no means follows that it is a general rule of law that a stranger to a contract who has given no consideration for a promise has a legal right to recover damages for the non-performance of it, merely because the performance of it would have been beneficial to him. There are cases in which it has been held that the person for whose benefit it was intended that the promise should be performed might maintain an action upon it; but, in view of the well-known elements of contracts at common law, even such cases do not justify the declaration of a general rule without carefully considering upon what principles the liability rests in such a case, and whether the rule involves a change in our conception of the ground of legal liability arising out of agreements.

It is generally admitted that on a simple contract an action can be brought only by the parties to the contract; but it is said that on contracts not under seal a different rule may prevail. The law of sealed instruments expressed in technical form the idea of the common law with regard to liability upon obligations. These were originally the only obligations arising out of express agreement, and it was upon these that the technical law of express agreements grew up. The action on the case upon promises arose, not strictly out of agreements, but out of the relations and circumstances of the parties. A promise was often alleged for form's sake when in fact there was none, and if liability existed by reason of the circumstances, it was sometimes alleged to rest upon a promise when in fact it rested on something else. There were, therefore, early cases in which a right of action appeared to be based upon a promise made to another when in fact it rested upon a right to an accounting or upon a trust or a debt; and it was easy to cite these cases afterward as sustaining an action of *assumpsit* upon a promise to another, while admitting that on a sealed instrument no such action would lie. The law of the sealed instrument, however, is that which deals with the obligation arising out of the contract itself, and the principles of this law are equally applicable to contracts not under seal. The old and well-established conception is that the obligations of a contract belong to and rest upon those who enter into the contract. It is only the parties to it that

acquire rights against each other by means of it, and mutuality is one of the elements of the obligation. In the case of sealed instruments the affixing of the seal was the submission of the party to the legal obligation, and no inquiry into the consideration of the agreement was necessary; but in dealing with contracts not under seal, the English courts determined very early that they would not enforce mere promises without anything given in exchange. There must be mutuality; there must be parties who have dealt with one another, and one must have parted with something in order to acquire a right from the other. It is still undoubtedly the law that the existence of a consideration is necessary to the creation of a valid contract; and if this is so, it follows that a promise to do something for the benefit of a person is not binding without a consideration, and that if he has nothing to do with the consideration, he acquires no right under the contract so long as consideration is an element of the contract. It is only the parties to the consideration that are parties to the contract, and these alone acquire a right to sue for the breach of it. This is the general rule arising out of the nature of a contract as defined by the common law; and if in any case rights are acquired by a third person, it is necessary to look for something else than the promise to sustain the right to sue. To lay down the general rule that a third person may maintain an action upon a promise made for his benefit is to do away with one of the elements of a contract, and to introduce a new principle in creating obligations. The effect of such a rule would be to create obligations without mutuality, and to make binding promises which are not even agreements, for want of parties who agree with one another.

While the rule is in fact laid down in this general form, it is not seriously contended that it is of general application. No one would say that a stranger might in every case take advantage of a contract which if performed would incidentally inure to his advantage. If, for instance, a tenant, desiring to improve his land for his own convenience, were to make a contract with a builder to erect upon it a building which would constitute a fixture and belong to the landlord, no one would say that the landlord could sue the builder for not performing this contract.<sup>1</sup> Even under the law of Scotland, where consideration is not as important an element in a contract as it is in the law of England, the *jus tertii*, which is

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<sup>1</sup> This illustration was used by Lord Cranworth in *Peddie v. Brown, Gordon, & Co.*, House of Lords, 1857, 3 Jur. N. S. 895.

recognized, is *jus quæsitum tertio*, a right intended to inure to the benefit of the third person;<sup>1</sup> and in some of those American cases in which the rule has been laid down that a stranger to a contract has a right to sue upon it, the rule has been in fact limited to cases in which the promisor and the promisee have both intended to secure the benefit to a third person, and in which also there has been some relation or obligation between the promisee and the party to be benefited which would give the latter some legal or equitable claim to the benefit of the promise.<sup>2</sup> It was such cases as this that gave rise to the rule, and although it is usually laid down in more general terms, it would be hard to find actual decisions in which the limitations did not exist.

It would carry us beyond the limits assigned to this article to examine all the cases and to see under what circumstances the rule is applied, and how far the actual decisions support the rule in its broadest form.

The cases are collected and arranged by States in an article in the "American Law Register," for September, 1890;<sup>3</sup> there is a thoughtful discussion of the subject with references to the cases in the "American Law Review," for April, 1881,<sup>4</sup> and the question is examined with especial reference to the New Jersey cases in the "New Jersey Law Journal," for July and August, 1881.<sup>5</sup>

It was pointed out by Judge Metcalf, in 1854, that the earlier cases in which the rule was declared did not warrant the assertion that the old rule of the common law had been changed, but that they were either cases like the old case of *Dutton v. Poole*,<sup>6</sup> in which the liability was based on the relationship of the parties, or cases of the use and occupation of land, like *Brewer v. Dyer*, then recently decided in Massachusetts,<sup>7</sup> or else cases of *indebitatus assumpsit* for money had and received, in which the action, "being an equitable one, can be supported by showing that the defendant has in his hands money which in equity and good conscience belongs

<sup>1</sup> Per Lord Cranworth in the case just quoted.

<sup>2</sup> *Vrooman v. Turner*, 69 N. Y. 280.

<sup>3</sup> 29 Am. Law Reg. (1st series), 596, Note to *Grant v. Diebold Safe & Lock Co.*, by Ernest Watts.

<sup>4</sup> Am. Law. Rev. 231. Article by Henry O. Taylor.

<sup>5</sup> 4 N. J. Law Journal, 197, 229. Article by Edward Q. Keasbey. See also note to *Casey v. Miller*, 1 Am. Law Reg. & Rev. (N. S.) 20, on "What Promises to Pay the Debt of another are within the Statute of Frauds."

<sup>6</sup> 1 Ventris, 318; 2 Levinz, 211.

<sup>7</sup> 7 Cush. 337 (1851).



to the plaintiff, without showing a direct consideration moving from him or a privity of contract between him and the defendant." This decision of Judge Metcalf with respect to the general rule has been approved in Massachusetts, and Judge Gray (now a Justice of the Supreme Court of the United States) said in a later case,<sup>1</sup> "The general rule of law is that a person who is not a party to a simple contract, and from whom no consideration moves, cannot sue on the contract; and consequently a promise made by one person to another for the benefit of a third, who is a stranger to the consideration, will not support an action by the latter. And the recent decisions in this commonwealth and in England have tended to uphold the rule and narrow the exceptions to it."

It will be seen by examining the earlier cases that most of them do fall within the classes suggested by Judge Metcalf, or else are cases in which the promise was really made to the plaintiff through a person acting in his behalf; and if there has been uncertainty in the early English cases, all that depart from the general rule have been distinctly overruled in England.<sup>2</sup>

One of the early cases in Massachusetts was *Felton v. Dickinson*,<sup>3</sup> in 1813. A master in taking a boy into his service agreed with the father to pay the boy a certain sum of money at the end of his term, and it was held that the son was entitled to an action for the money. The court said, "It is clear that the father had the son's advantage in view," and it may be added that the service for which the money was promised was performed by the boy. Another case was *Arnold v. Lyman*,<sup>4</sup> and here a debtor of the plaintiff had conveyed property to the defendant upon a written agreement that he should pay money to the plaintiff. This was a case of property received by the defendant, and a substitution of the plaintiff as creditor in the place of the person who conveyed the property. *Hall v. Marston*<sup>5</sup> was a case where a bill of exchange was sent from abroad to the defendant with instructions to pay a certain part of the proceeds to the plaintiff, and it was held that the plaintiff might bring an action. *Brewer v. Dyer*<sup>6</sup> was a case in which the defendant

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<sup>1</sup> *Exchange Bank of St. Louis v. Rice*, 107 Mass. 37 (1871).

<sup>2</sup> *Tweddle v. Atkinson*, 1 B. & S. 393.

<sup>3</sup> 10 Mass. 287.

<sup>4</sup> 17 Mass. 400 (1821).

<sup>5</sup> 17 Mass. 575; *Williams v. Everett*. The English case below referred to was cited and distinguished.

<sup>6</sup> 7 Cush. 337.

had acquired from a lessee the use and occupation of land, and the landlord was held to be entitled to the rent agreed upon with the lessee. *Dutton v. Poole* was one of a number of early English cases in which the relationship of the person for whose benefit the promise was made was held to give him a right to sue upon the promise. It was, moreover, a case in which an heir of an estate had induced his father not to cut down timber in order to raise a portion for his sister upon a promise to pay the sister her portion; and the court held that the son, having had the benefit of the timber, was subject to an action by his sister and her husband for the money he had agreed to pay to her. The sister had lost her portion by reason of the promise of the defendant, and was in that sense a party to the consideration of the agreement made with her father for her benefit. The court, however, said, "It might be another case if the money had been to have been paid to a stranger, but there is such a nearness of relation between the father and child, and 't is a kind of debt to the child to be provided for, that the plaintiff is plainly concerned."<sup>1</sup> On the hearing of the case upon writ of error, the argument for the plaintiff was that "The action was maintainable by the party to whom the promise was made or to the *cestuy que use*. The promise was made indifferently;" and of this opinion were all the justices and barons.<sup>2</sup> Whatever the ground of the decision may have been, the result was an equitable one, and Lord Mansfield, who looked chiefly to such results, said in *Martin v. Hind*,<sup>3</sup> "It is difficult to conceive how a doubt could be entertained in *Dutton v. Poole*." The decision, however, rests upon the same ground as that in *Rookwood's Case*,<sup>4</sup> where the younger sons were allowed to bring an action for the amount the heir had promised the father he would pay to them if the father would charge their portions upon the land. The land was subject to an equitable charge, and the consideration for the promise really came from the plaintiffs.

There is an old case referred to in *Bourne v. Mason*,<sup>5</sup> as *Sprat v. Agar*, in the K. B. 1 Cro. 619, in which the nearness of the relation is said to give the plaintiff the benefit of the consideration of a promise made to another. It was the case of a promise to a physician to give money to his daughter in case he effected a certain

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<sup>1</sup> *Dutton v. Poole*, 1 Vent. 318, 332; 2 Levinz, 211; T. Jones, 102.

<sup>2</sup> *Dutton v. Poole*, Raym. 302.

<sup>3</sup> 1 Cowp. 437; 1 Doug. 142.

<sup>5</sup> 1 Ventris, 6.

<sup>4</sup> Cro. Eliz. 164.

cure. And in *Levet v. Hawes*, which is found in *Cro. Eliz.* 619, it is held that a father cannot maintain an action on a promise made to him to pay a sum of money to his son on his marriage with the defendant's cousin. In *Rippon v. Norton*, *Cro. Eliz.* 849, it was also decided that the person to whom the promise was made for the benefit of his son could not maintain the action. The doctrine, however, that nearness of relation is sufficient to give the benefit of the consideration, though often referred to in the text-books, is not sustained by the early cases, and has no foundation in principle, and has been wholly repudiated in modern cases, both in England and in this country.

There are a good many early cases in which it is held that an action may be maintained by one for whose benefit money or goods have been given to another, though the promise to pay was not made to the plaintiff himself. In these the action was based upon the idea that there was a debt arising out of the receipt of the money or property, and that it was payable to the plaintiff. The defendant has received property charged with the debt, or has obtained money which he has agreed to pay to the plaintiff. No distinction was drawn between legal and equitable obligations, and the courts did not stop to consider whether, so long as the order was subject to be countermanded, the defendant was not legally liable to the other party. The later English cases and many American decisions have limited the right of recovery even in equity to cases in which the plaintiff has changed his position upon the strength of the stipulation,<sup>1</sup> and at law to cases where there is an acceptance of the order so that it cannot be revoked.<sup>2</sup>

The earlier cases, however, are fair examples of one of the classes referred to by Judge Metcalf as forming exceptions to the general rule with reference to parties to actions, and it will be found that these will furnish precedents for the later American cases without resorting to such a reversal of the general rule as to declare that a person for whose benefit a contract is made may maintain an action upon it.

*Whorwood v. Shaw*,<sup>3</sup> was an action of debt in which it was declared that Field had acknowledged to have received of one Prettie forty pounds to be equally divided between A and B and to their use. The action was brought by A, and one question was

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<sup>1</sup> 1 *Spence Eq. Jur.* 280-286.

<sup>2</sup> *Williams v. Everett*, 14 *East*, 582 (1811).

<sup>3</sup> *Yelverton*, 23.



whether debt or account lay; and it was adjudged that, although there might be no contract between the parties, "uncore qt argent ou biens soit baile sur cond. al use, A, A poit aver det de ceo. issint est l'opinion Montague 28 H. 8, Dyer 20, 21 en Core et Woody's Case, et auxi un president de tiel action de det en le liure de entries, 45 Eliz. B. R."

In *Starkey v. Mill*,<sup>1</sup> a father gave goods to his son in consideration that the son should pay the plaintiff twenty pounds, and Roll, C. J., held on motion for arrest the declaration was good because there was not merely a debt by intendment, but a plain contract, because the goods were given for the benefit of the plaintiff. "Here is a promise in law made to the plaintiff, though there be not a promise in fact; there is a debt here and the promise is good."

In *Oldham v. Bateman*,<sup>2</sup> where the guardian of an infant paid J. S. £12 at the infant's request, and J. S. agreed to educate the infant and pay him £12 when he came of age, it was held that the infant was the proper person to bring suit for the money.

In all these cases there was money or property placed in the defendant's hands for the use of the plaintiff, and it was held that the plaintiff might sue for it as a debt.

On the other hand, where the action depended on a promise there are early cases in which the right of the person to be benefited to bring suit is denied.

In *Evans v. Jampney*, 24 Car. I., cited by Windham, J., in *Dela Bar v. Gold*,<sup>3</sup> A sold a house to B and in consideration thereof B promised to pay money to A and C.

In an action brought by them it was adjudged that there was no good consideration to C. In *Bourne v. Mason*<sup>4</sup> the case was distinguished from cases where the plaintiff did a meritorious act or was a near relation of the person to whom the promise was made; and it was held that he could not recover because he was a stranger to the contract.

Lord Holt, in *Eland v. Yard*,<sup>5</sup> and Buller, J., in *Marchington v. Vernon*,<sup>6</sup> laid it down as a rule that "on a promise not under seal

<sup>1</sup> Style, 296; 1 Viner's Abr. 333, *sub nom.* *Starkey and Mylne*.

<sup>2</sup> 1 Rolle Abr. 31, pl. 8; 1 Viner's Abr. 334.

<sup>3</sup> Keb. 64. There is a long discussion of the subject in *Dela Bar v. Gold*, Keb. 44, 63, but no decision.

<sup>4</sup> 1 Ventris, 6, 20 & 21 Car. II. in B. & R.

<sup>5</sup> 1 Ld. Raym. 368.

<sup>6</sup> 1 Bos. & Pul. 101, note.

made by A to B for a good consideration to pay B's debt to C, C may sue A." This was not supported by authority at the time nor necessary to the decision, but it has since been copied from one text-book to another, and quoted in the cases until it has begun to bear the appearance of authority in itself; but in *Crowe v. Rogers*,<sup>1</sup> decided a few years afterward, this doctrine was distinctly repudiated.

The plaintiff had a claim against H for a debt of £70. The defendant promised H that if he would make a title for him he would pay the plaintiff the £70. On demurrer to a declaration alleging these facts it was held that the plaintiff could not recover, because the consideration moved from H, and not from the plaintiff. This was approved and followed in *Price v. Easton*.<sup>2</sup> The declaration stated that W. P. owed the plaintiff £13, and that it was agreed between W. P. and the defendant that if the defendant would work for him and leave his wages in his hands, he the defendant would pay the plaintiff the money due to him from W. P.; and there was an averment that W. P. had performed his part of the agreement. After a verdict for the plaintiff, judgment was arrested, and Littledale, J., said, "This case is precisely like *Crowe v. Rogers*, 1 Strange, 592, and must be governed by it."

In *Williams v. Everett*,<sup>3</sup> where bills were remitted from the Cape of Good Hope to the defendants in London, to be paid in certain sums to various persons, and the defendants declined to hold the money for the purpose, but did in fact collect the money, it was held that an action would not lie against them by the persons to whom the money was to be paid. It was open to the remitter to countermand the order until the receiver had made some engagement with the person to whom the money was to be paid; but in *Lilly v. Hayes*,<sup>4</sup> where the receiver of the money admitted that he held it to the plaintiff's use, and the plaintiff by his authority was notified of this, it was held that the plaintiff might recover the money from him in an action for money had and received, and that he could not allege want of consideration moving from the plaintiff. In this case the defendant had actually made himself the agent or banker of the plaintiff, and the right of action arose out of this relation of trust and not out of any promise made to another.<sup>5</sup>

<sup>1</sup> 1 Strange, 592 (1724).

<sup>2</sup> 14 East, 582 (1811).

<sup>3</sup> B. & Ad. 433.

<sup>4</sup> 5 A. & E. 584 (1826).

<sup>5</sup> With reference to the distinction between *Lilly v. Hayes*, and *Williams v. Everett* and similar cases, see the notes to *Lampleigh v. Brathwait*, 1 Smith Ldg. Cas. 271 and

In *Tweddle v. Atkinson*,<sup>1</sup> the question was distinctly raised whether one for whose benefit an express promise was made might bring an action upon it if he were a stranger to the consideration. It was, like *Dutton v. Poole*, the case of a promise made by a father for the benefit of his child. After a marriage, the fathers of a husband and wife agreed together each to pay a sum of money to the husband, and they also agreed that they should have the right to sue for the parties at law. It was nevertheless decided that the husband had not a right of action. Crompton, J., said: "It is admitted that the plaintiff cannot succeed unless the case is an exception to the well-established doctrine of the action of assumpsit. Modern cases have overruled the old decisions. They show that the consideration must move from the party entitled to sue upon the contract. It would be a monstrous proposition to say that a person was a party to the contract for the purpose of suing upon it for his own advantage, and not a party to it for the purpose of being sued."

This is the established law in England to-day, and the same rule is distinctly declared by many courts of the American States, as it was expressed in the decision of Judge Gray in *Massachusetts*.<sup>2</sup> In other States, however, the courts, in deciding cases that came within the classes referred to by Judge Metcalf (cases of money had and received, or in which there was a trust or a right to an accounting), have referred to the old cases, and declared that it had been decided that if one make a promise to another for the benefit of a third, the latter may maintain an action upon it. *Dutton v. Poole*, and the language of Lord Holt have been quoted by one court after another as authority to this proposition; and Mr. Parsons, in his work on Contracts,<sup>3</sup> referring to *Dutton v. Poole* and to early cases in *Massachusetts* and *Pennsylvania*, and some others, said the rule was more positively asserted in this country, and that it might be safe to consider it the prevailing rule with us. After this Mr. Parsons himself was referred to as authority, and it has been frequently declared to be "well settled as a general rule that in cases of simple contracts, if one person makes a promise for the benefit of a third, the third may maintain

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288, 8th Am., from 8th Eng. ed. See also *Howell v. Batt*, 5 B. & Ad. 504 (1833); *Baron v. Husband*, 4 B. & Ad. 611 (1833).

<sup>1</sup> 1 B. & S. 393.

<sup>2</sup> *Exchange Bank of St. Louis v. Rice*, 107 Mass., quoted above.

<sup>3</sup> 1 Pars. on Cont. 467.



an action upon it, though the consideration does not move from him."<sup>1</sup>

It would take too long to refer to the cases in detail, but it may be safely said that the rule is seldom in fact applied, except in cases where the promisor and the promisee have both intended to confer the benefit on the person who brings the action, or where the person who sues is the only person who is interested in the performance of the contract, or cases of money paid to one for the use of another, or cases where one having money for another agrees to pay it to a third.<sup>2</sup> The Supreme Court of the United States, in a later case than that referred to in the beginning of this article, distinctly declares the general rule to be that privity of contract is necessary to the maintenance of an action of assumpsit, but says there are confessedly many exceptions to it.<sup>3</sup> "One of these, and by far the most frequent one," says Mr. Justice Strong, "is the case where, under a contract between two persons, assets have come into the promisor's hands, or under his control, which in equity belong to a third person. In such a case it is held that the third person may maintain an action in his own name; but then the suit is founded rather on the implied undertaking the law raises from the possession of the assets, than on the express promise. Another exception is where the plaintiff is the beneficiary solely interested in the promise, as where one person contracts with another to pay money or to deliver some valuable thing to a third. But where a debt already exists from one person to another, a promise by a third to pay such debt, being primarily for the benefit of the original debtor, and to relieve him from liability to pay it (there being no novation), he has a right of action against the promisor for his own indemnity; and if the original creditor can also sue, the promisor would be liable to two separate actions, and therefore the rule is that the original creditor cannot sue;" and it was held that the holders of coupon bonds could not maintain an action against one who had agreed with the maker of the bonds to assume the payment of them.

The contrary conclusion was reached by the Court of Appeals in

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<sup>1</sup> *Joslin v. N. J. Car Spring Co.*, 36 N. J. Law, 141; *Farley v. Cleveland*, 4 Cow. 432, 9 Cow. 639; *Lawrence v. Fox*, 20 N. Y. 268; 93 U. S. 143.

<sup>2</sup> See American Note to *Lamplugh v. Brathwait*, 1 Smith Ldg. Cas. 288, 8th ed., and the articles above referred to in 29 Am. Law Rev. (New Series), 596; 15 Am. Law Rev. 231.

<sup>3</sup> *Nat. Bank v. Grand Lodge*, 98 U. S. 123 (1878).

New York in a similar case, because the court, instead of abiding by the common-law rule of privity of contract, assumed it to be a broad principle that if one person make a promise to another for the benefit of a third person, that third person may maintain an action upon it. This rule had been declared in *Farley v. Cleveland*,<sup>1</sup> and *Lawrence v. Fox*,<sup>2</sup> and in *Burr v. Beers*,<sup>3</sup> and *Denio, J.*, applying the rule (which he did not approve of), felt obliged to hold that an action at law might be maintained by a mortgagee against one who had assumed the payment of the mortgage. No injustice was done in the particular case because the defendant was in fact liable in equity; but in the next case of the kind that came before the court it appeared that the deed in which the mortgage debt was assumed was itself a mortgage which had been paid, so that the defendant was not liable in equity to the plaintiff nor to any one else, and the court had great difficulty in reconciling the doctrine of *Burr v. Beers* with the justice of the case, and was obliged to say that the doctrine did not apply to such a case.<sup>4</sup> Again, in *Vrooman v. Turner*,<sup>5</sup> where the person to whom the agreement of assumption was made was not himself liable on the mortgage, the court held that the doctrine must be confined to cases where there is "first, an intent by the promisee to secure some benefit to a third person; and secondly, some privity between the two, the promisee and the party to be benefited."

In New Jersey, where the doctrine of *Lawrence v. Fox* and *Dutton v. Poole* had been casually recognized by the Supreme Court,<sup>6</sup> the Court of Chancery was urged to apply it to the case of the assumption of a mortgage after the person assuming it had conveyed the premises back again to the original debtor, who had again assumed the payment of the mortgage debt.<sup>7</sup> The court avoided any criticism of the Supreme Court by saying that the rule that a third person may sue upon a contract did not apply to contracts under seal, and that the liability of the grantee of a deed was regarded in New Jersey as a liability under a sealed instrument,<sup>8</sup> and the vice-chancellor put the liability of the person who assumes a mortgage entirely upon equitable grounds. This deci-

<sup>1</sup> 4 Cow. 432 (1825); id. 639 (1827).      <sup>8</sup> 24 N. Y. 178.

<sup>2</sup> 20 N. Y. 268 (1859).

<sup>4</sup> *Garnsey v. Rogers*, 47 N. Y. 233.

<sup>5</sup> 69 N. Y. 280.

<sup>6</sup> *Joslin v. New Jersey Car Spring Co.*, 36 N. J. L. 141.

<sup>7</sup> *Crowell v. Currier*, 27 N. J. Eq. 152.

<sup>8</sup> *Finley v. Simpson*, 2 Zab. (22 N. J. Law) 311.

sion was affirmed by the Court of Errors and Appeals on the same grounds,<sup>1</sup> and although the court said that in some cases actions of assumpsit might be maintained on a promise made by the defendant to a third person without any consideration moving between the parties, and that no such rule existed with respect to sealed instruments, yet it is obvious that the decision in this case must have been just the same, whether the agreement to assume the mortgage had been in a simple contract or a deed under seal. The liability to such an agreement does not rest upon a promise to a third person, but upon equitable considerations arising out of the fact that the property is held subject to an existing liability to pay the debt.

If the liability arose out of the promise, then it could not be affected by any new agreement between the original parties or change in their relations.

These cases are in themselves enough to show that what is called the prevailing American rule is not in fact a general rule of law, and that the principles applicable to those cases in which a suit is brought by one for whose benefit a contract is made, ought not to be expressed in this general form. There is no need of so broad a rule, nor is it necessary to declare any rule that is contrary to the established principles of the law of contracts at common law.

It is sufficient to decide each case upon principles which apply to it, and will be found that the result of the decisions will not require the enunciation of a rule giving strangers to contracts a right to sue upon them.

*Edward Quinton Keasbey.*

NEWARK, N. J., May 8, 1894.

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<sup>1</sup> *Crowell v. Hospital of St. Barnabas*, 27 N. J. Eq. 650.



## EIGHTY YEARS OF ARBITRATION.

“OUR setting forth is by no means for the purpose of gaining spoil or exacting ransom, though it may well happen that such may come to us also. We go to France and from thence, I trust, to Spain in humble search of a field in which we may win advancement and perchance some small share of glory.” Such were Sir Nigel Loring’s words to his retainers as he set forth in 1367 to take command of the “White Company.” Such was the spirit that fostered chivalry. And for centuries after chivalry died, wealth and glory were sought in war, and but seldom elsewhere. Ambition and passion continued to find their natural vent in war long after the world had laughed at Don Quixote and groaned under the Armada. It was not until Napoleon had sacrificed whole nations to his ambition that any serious protest was raised against the needless resort to arms.

For some years after 1814, when the first peace society was founded, the peace sentiment found little sympathy, and its public expression was somewhat spasmodic and no more efficacious than the ordinary day-after resolutions for reform. But half a century later when the whole civilized world had been shaken by a rapid succession of frightfully destructive wars, when the Crimean War, the American Rebellion, and the Franco-Prussian War had brought to every home the horrors of military strife, the recruits to the standard of peace became far more numerous and energetic, and their proposals became more rational, and received better attention.

Instead of preaching vague sermons on the blessings of peace, they concentrated on arbitration as the best solution of international difficulties. In a few years their societies spread throughout Europe and America, legislatures reinforced their views with resolutions, and nations adopted treaties of arbitration. In this century have occurred not less than fifty instances of disputes actually arbitrated, the most important of which, the Geneva Award in 1873, is familiar to every one. The cases, however, do not cover a wide range. With the single exception of a question of succession in a minor European principality, they are all confined to disputes territorial and financial. The wars of this cen-

tury, on the other hand, have been almost as many in number, and much wider in range. A question of succession was made the pretext for the Franco-Prussian War; the Zulu War was due to England's ambition for territory; and the war of 1830 between France and Algiers grew out of a financial dispute; while religion was the cause of the Sepoy Rebellion, independence was the goal of the Greek Revolution, and social troubles were the origin of the American Rebellion. The result of eighty years' experience, then, seems to be that in disputes financial and territorial, between parties which cannot easily fight, arbitration has become a recognized means of settlement; in disputes religious and social, and struggles for independence, arbitration has no place; while in disputes over succession, territory, and finance, where there is a motive of aggrandizement or glory instigating one party, arbitration has been equally out of the place in the past, and its greatest effect in the future will be to require the aggressor to find a more substantial *casus belli* than has been necessary hitherto.

It is not merely the unwillingness of nations to adopt arbitration that accounts for its small success. It is essentially limited in its possibilities, — first from the nature of war, and then from its own nature.

War is the result of evil passions inherent in mankind. The ideal remedy would be an improvement in human nature such as to avert all violent quarrels, rather than moral suasion applied when passion is beyond control. The general tendency of modern enthusiasms is far from hostile to war; quite the reverse, it glorifies war. Whole nations bow down and worship a military leader, and seek to make him their ruler. The school-boy's hero is Julius Cæsar or Napoleon I. He is drilled in military history, and remembers Hannibal and the Black Prince, and the dates of Marathon and Bannockburn, long after he can tell you what influence the leaders had on the world, and why the battles were important. The finest and most thrilling literature, too, from the "Iliad" to "The Deluge" treats of the same theme, and lends its glamour. A solid foundation for the popular esteem for military eminence exists in the courage and self-sacrifice called into play more vividly perhaps in war than in any other human affair. The sentiment of nationality, usually regarded as a virtue, tends to narrow man's ideas from the human brotherhood in which war would be practically impossible to a condition where a fiery and ambitious ruler can plunge his country into strife, and then, confident of sup-

port, bid his fellow-citizens defend their fatherland. National pride, jealousy, resentment, and ambition, it is needless to say, help to make war the natural solution of quarrels.

Against the strong push of these many instincts and impulses is set a force dependent solely on good-will in its inception and good faith in its execution. An appeal to man's higher nature alone can bring arbitration into play, and the same appeal must be effective to induce the loser to abide by the arbitral decree, for a refusal to do so places the parties simply in their former condition.

These inherent defects weaken arbitration as a precedent by making its application limited and uncertain, and consequently weaken its support. For it was only urged as a means of avoiding war, and as its limitations become apparent, its friends must recognize the necessity of advancing to a wider and more permanent scheme.

Several writers have outlined plans for permanent international tribunals capable of enforcing their decrees, or for a federation based on a European citizenship. At first blush such notions appear highly chimerical, and the objection is made immediately that the world is not ripe for them. But it is in preparing the way for some such permanent and powerful institution that arbitration has, in my opinion, had its greatest and most valuable effect. Within the last half-century it has become a factor in international law. Regarded at first as an impractical if not impossible scheme, it has now become a familiar method of settling a certain class of controversies. When an international dispute arises the people no longer regard war as an inevitable necessity. Their former attitude of resignation has changed to one of hope for a better solution of the difficulty. They expect arbitration to be tried or some reason for its inadequacy to be given. The recent Behring Sea trouble produced much less war talk than former bickerings between the United States and England, and its peaceful solution was a matter of general congratulation even among the newspapers, the first organs to start a war scare, and the last to abandon it. The development of public opinion which arbitration has produced should warn its friends not to rest content with any such half-way measure. Arbitration has proved an imperfect substitute for war; but it does not follow from that that arbitration has accomplished its mission in simply providing a peaceful means of healing a few



ruptures. Its great achievement has been the training of public opinion. If the peace societies can formulate some scheme, not too ambitious, for an international tribunal, public opinion will be far stronger in its support than it would have been before arbitration was fairly tried. Arbitration has paved the way, perhaps, through other temporary and makeshift institutions, but none the less surely, for some permanent and universal solution of international disputes without resort to war. It has given a strength to the friends of peace, which if they have the courage and wisdom to avail themselves of it can accomplish far more toward relegating war to the background of barbaric customs than any quantity of pledges of national faith. The history of the past eighty years must convince every opponent of war that now is not the time to rest content with what has been accomplished, that nations have adopted his old rules of conduct, that he must keep to the front and formulate that new tribunal which shall bring "on earth peace, good-will toward men."

*H. A. Davis.*

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THE LAW SCHOOL—THE LIBRARY.—In 1869-70, just before Mr. Langdell became Dane Professor and Dean, the library, as he has pointed out in his annual report for 1889-90, "was so nearly a wreck that it required to be reconstructed from the foundation." In the next twenty years nearly fifty thousand dollars were spent for books, and over ten thousand upon binding and repairing. "Prior to 1870-71 the only persons employed to care for the library were a student librarian and the janitor of Dane Hall. From the opening of the library in the morning until the closing of it at night it was subject to no supervision or control whatever. All persons who chose resorted to it and used it as they pleased, and behaved in it as they pleased; and thus disorderly conduct, spoliation, and theft were constantly occurring. Now, a permanent librarian, a permanent assistant-librarian (both of whom have held their present positions for the last eighteen years), and three assistants are constantly employed in the care and administration of the library."

And the report goes on to describe the means by which this "wreck" was made into the present efficient library, — a description which, as President Eliot said in his report that year, "will interest any one who habitually uses a professional library."

In 1882, through the efforts of Professor James B. Thayer and L. D. Brandeis, Esq., of Boston, a fund of \$47,000 was secured, the income of which can be used for the purchase of books for the library, and this is its only invested fund.

It is now sixty-two years since the library was deposited in Dane Hall. It then consisted of less than 1,000 volumes, and now has upward of 33,000. With the rapidly increasing number of States, and the multiplication of both State and special series of reports, it is startling to consider what figures will be required fifty years hence to state the resources of the library, and what appliances will be required to render such a vast mass of reports available for the use of the Faculty and students of the School.

ANOTHER TESTATOR FOILED. — If a man should speak or write of his "niece Eliza Waterhouse" anywhere but in his last will, and, upon looking into the matter, it appeared that he had no niece, but that his wife had two grandnieces of the name, the one legitimate, the other, illegitimate, living in the house with him and his caretaker in his old age, one would surely inquire farther before feeling certain that he meant the legitimate niece. It is to be regretted that the English Court of Appeal has considered itself so root-bound by authority that it must needs deny farther investigation of the surrounding circumstances, and give the wife's legitimate grandniece the bequest. *Re Fish, Ingham v. Rayner*, 38 Sol. L. J. 307.

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CODIFICATION. — In re-enacting § 17 of the Statute of Frauds in the English Sale of Goods Act, 1894, it is declared that "there is an acceptance . . . when the buyer does any act in relation to the goods which recognizes a pre-existing contract of sale, whether there be an acceptance in performance of the contract or not." It would seem that the interpretation of this provision of the Act of 56 & 57 Victoria may go on as merrily as has that of the Act of 29 Charles II.

"No contract . . . shall be allowed to be good" has been changed to "A contract . . . shall not be enforceable by action." Formerly a carrier could set up the statute against a consignee suing for lost goods. *Coombs v. Ry. Co.*, 3 H. & N. 510. If the law of such cases is not to be changed, the interpretation of this phrase of the Act must needs be vigorously done. But if the law is changed, there need be no complaint, for the setting up of the Statute of Frauds by third persons is no very commendable practice. Brown on Frauds, 4th ed., § 138 j.

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ANTICIPATORY BREACH. — Lord Justice Kay in *Synge v. Synge* (1894), 1 Q. B. 466, has added a stone to the cairn in honor of Lord Cockburn's "inchoate right" in a plaintiff to sue on a promise before the defendant's performance is due. The action was on an agreement of the defendant to leave at his death to the plaintiff a life interest in certain lands owned by him, in consideration of her promise to marry him. Having induced the object of his affection to unite her lot with his, this gentleman conveyed to his daughters the land in question, doubtless hoping to leave any difficulties to his executors. But the lady brought her action immediately, perhaps wisely distrusting the compensation she might get from her husband's property at his decease, and the court gave her the present value of the life interest.

The case shows the nature of the doctrine quite free from the consideration involved usually in the question whether the plaintiff is obliged to go on to perform in order to get his right of action. It is now evident that in England, by a contract, one binds one's self to quite a different thing from the mere performance, — that is, to a course of conduct from the time of promise till that of performance which shall make the promise reasonably probable of fulfilment. It is barely possible in the case in point that the defendant might have caused his daughters to reconvey to him, and so fulfilled his contract. In fact, in all the cases on this subject, the breach has ordinarily been no more than a strong probability that defendant could not perform. Had the question come up for



the first time in a case like the present, it could hardly be possible that the additional liabilities to a contract, imposed by the doctrine, should not have been observed.

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**MALICIOUS INTERFERENCE WITH CONTRACT.** — The doctrine of a case is often accepted by the courts before its true bearing is thoroughly understood, and the result is that a period of uncertainty and confusion follows that is only ended when some clear-minded judge works out the theory and properly adjusts it. The doctrine of *Lumley v. Gye* has had such a course. It is no longer a novelty to find it followed, but when the reasons for it are so well stated as they are in *Van Horn v. Van Horn et al.* (28 Atl. Rep. 669) it should be noted. One passage is especially worth quoting. "While a trader," says Van Syckel, J., "may lawfully engage in the sharpest competition, . . . when he oversteps that line and commits an act with the malicious intent of inflicting injury upon his rival's business, his conduct is illegal, and if damage results from it, the injured party is entitled to redress. Nor does it matter whether the wrong-doer effects his object by persuasion or by false representation. The courts look through the instrumentality or means used, to the wrong perpetrated with the malicious intent, and base the right of action upon that." The whole opinion will prove a very valuable one in putting the doctrine on a more satisfactory and more intelligible basis.

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**LIBEL — AGAINST BRITISH MUSEUM.** — Mrs. Biddulph Martin (Victoria Woodhull) must seek alleviation for the outrage to her reputation at more tender hands than those of Baron Pollock. In the trial of the suit instituted by her husband and herself against the trustees of the British Museum (*Martin et ux. v. Trustees British Museum*, 10 T. L. R. 338), for having given out to general readers the story of the Beecher-Tilton case, a verdict was found for the defendant, and though the case has been appealed, it is hardly probable that there will be a change, at least in the law. The jury seem to have gone wild on the questions put to them, and it is hard to find meaning in their answers; but at least they returned that neither the defendants nor their servants knew or ought to have known of the libellous matter that they gave out. Assuming that by "ought to have known" they mean a reasonably faithful discharge of the duties put upon them by Parliament, the case is brought quite in line with the authority cited by Baron Pollock, *Emmens v. Pottle*, 16 Q. B. D. 354 (in the Court of Appeal, 1885). That was a case of a newsdealer who unwittingly sold libellous matter from his stand and was held not to have published it.

It cannot be said that the offence in libel and slander is the influence of the defendant's opinion on the plaintiff's reputation; it is rather the injury to the plaintiff's reputation in any way by the dissemination of falsehood. Therefore cases like *Emmens v. Pottle* would seem to be capable of explanation only on the failure to connect defendant with the falsehood. Certainly in actions on the case generally, if a defendant can show that no ordinary man would have anticipated the result which actually occurred, it is a good defence. Here the finding of the jury seems to show such a defence, and there is no reason why the defend-

ants should not be excused. The case would, of course, be quite different if the defendants knew the injurious nature of the book but were honestly certain of its truth. That is properly a question of privilege. Here the defendant is not connected with the act at all. The case is, however, full of suggestion for librarians.

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DAVID DUDLEY FIELD was a man whose life-work was directed toward two ends: simplification of procedure, and codification of substantive law. He lived to see the first well accomplished. The cobwebs have been removed and the old wine of justice is no longer kept inaccessible in the cellars of the Circumlocution Office. But while common-law pleading has gone everywhere, barely a State or two has adopted a code of substantive law, and Judge Dillon, in his recent valuable book, is in favor of no greater kind or degree of codification than that recommended by Joseph Story, Theron Metcalf, Simon Greenleaf, and the other Massachusetts Commissioners, who reported on the subject in 1836, eleven years before Mr. Field began to use the broom which has swept away the old forms.

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CONSTITUTIONAL LAW: APPROVAL OF BILL AFTER ADJOURNMENT OF CONGRESS.—The various ways in which the President may treat a bill presented to him for consideration are expressly provided for by the Constitution (Art. I. Sec. 7, cl. 2) except one. Of the effect of the President's approval of a bill after Congress adjourns, nothing is said. Whether such a contingency was foreseen by the framers of the Constitution or not, it may be presumed that the omission was intentional and that no provision was expressly made to meet such a case because it was deemed to be sufficiently dealt with by implication. For over a century the practice of the Executive has been in accordance with the general interpretation of this clause,—that an adjournment of Congress within ten days after the bill has been presented to the President, and before he has acted upon it, precludes any further action on his part; but the cases have been so rare in which the President has approved a bill after an adjournment that the right to do so is for the first time judicially considered in the case of *United States v. Weil et al.* (Court of Claims, Apr. 1894). In an opinion which shows careful research in its historical treatment of the veto power, Judge Nott explains away the practice and reaches a conclusion contrary to the previously accepted interpretation of the clause. So able is his argument that the question may fairly be termed an open one.

The practice on the part of the Executive of signing a bill only before an adjournment became well established before its inconvenience was foreseen. So fearful were succeeding Presidents lest they should give to an act the suspicion of unconstitutionality that only in two instances has a bill been retained for consideration and approval after an adjournment. President Lincoln signed the Captured Property Act on March 12, 1863, after the term of the Thirty-Seventh Congress had expired, and notwithstanding the fact that the bill did not reach him till after the adjournment. His right to approve the bill was the subject of an adverse report by the House Judiciary Committee of the next Congress, but no vote was taken upon it, and the act became so generally recognized as valid that the constitutionality of the procedure never arose for



judicial inquiry (18 Court of Claims, 700). The only other instance involved the jurisdiction of the Court of Claims in the principal case. A special act referring the cause was submitted to President Harrison on Dec. 20, 1892, and was signed by him on Dec. 28th. Meanwhile, on Dec. 22d, Congress had adjourned for the holidays to Jan. 3, 1893. Thus the bill was signed after an adjournment and within ten days after its presentation. Although the latter case is one of an adjournment for a recess and before the expiration of a congressional term, Judge Nott makes no distinction between it and the first instance where the bill was signed, not only after the close of a session, but even after the congressional term had expired. He would thus make his decision of general application.

The power of approving a bill after the adjournment of Congress is at least not forbidden by the Constitution, and as the disputed point does not involve any limitation on the powers of the States, but simply a question of procedure, the rule of construction that *expressio unius est exclusio alterius* does not apply. Can the power then be reasonably inferred? The last part of clause two provides that a bill shall not become a law if Congress adjourns within ten days after the bill has been presented to the President, but refers only to cases where the bill is not signed. The first part of the clause reads: "Every bill . . . shall, before it becomes a law, be presented to the President; . . . if he approve, he shall sign it; but if not, he shall return it with his objections to that House in which it shall have originated." If the injunction "if he approve he shall sign it" is to be regarded as absolute, complete in itself, and is not to be considered conjunctively with the clause providing for the return of the bill, the case would be clear. The House Judiciary Committee raised the objection that under such an interpretation the President could hold a bill ten months as well as ten days after adjournment. But the objection seems well met by the fact that the Constitution has fixed ten days as a sufficient time for the consideration of bills while Congress is in session, and it is reasonable to suppose that the same limit should apply although an adjournment of Congress intervene. A greater difficulty lies in the fact that the injunctions "he shall sign" and "he shall return" are so connected and dependent that it seems to have been intended that the President, at the time of acting upon a bill, should have the option of signing or vetoing it. But if he veto the bill, he must return it with his objections to the House in which it originated; and if that House has adjourned, it is no longer possible for him to exercise his right of veto. The alternative being taken away, it would seem to follow that the right of approval was also gone. The "pocket veto," it is true, would have the same effect as if the bill had been returned by the President with his objections, but it must be remembered that the "pocket veto" is not properly a veto, and was never intended as an active measure of disapproval. Its very object was to provide for cases of inaction on the part of the Executive.

There are a few cases involving the interpretation of a similar clause in some of the State Constitutions. In New York and Georgia it has been held that the Governor may sign a bill within ten days after it is presented, although the Legislature has adjourned (30 Barb. 24; 21 N. Y. 517; 41 Ga. 157). But in each of these States the Governor had exercised the right for some time before the cases arose, and a contrary decision would have resulted in serious consequences. In the Georgia case the judge stated that as an original question, apart from usage, he would



have decided the other way. The same view of the question has been taken in Iowa, Louisiana, and Illinois (67 Iowa, 702; 22 La. An. 545; 103 U. S. 423), though the cases are not exactly in point. In California (2 Cal. 165) the question was unaffected by usage or otherwise, and the court consistently held that the veto power was a legislative function, and the Governor could not exercise it after the Legislature adjourned. Thus the authorities are conflicting, and they naturally will be until the clause which the State Constitutions have so closely followed has been judicially interpreted by the Supreme Court.

In giving to the President the power to veto, it was intended that every bill should be subjected to his deliberate consideration. That purpose is now defeated as there are so many bills presented to him during the last few days of a session. The evil has long been the subject of comment, and any safe relief will be welcome.

If the usage of a century can be shown to be ill-founded and the more reasonable and broader view of Judge Nott should be followed by the Supreme Court, to which it is understood the principal case is appealed, it will insure more careful legislation and promote the dignity and independence of the Executive.

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## RECENT CASES.

AGENCY—CONTRACT UNDER SEAL—VALIDITY AS A SIMPLE CONTRACT.—A member of a partnership having no authority to contract for the firm under seal, mortgaged certain personal property of the firm and deeded it to mortgagee under seal, the seal being entirely unnecessary. *Held*, that though the instrument was invalid as a deed, it was operative as a simple contract. *McNeal Pipe and Foundry Co. v. Woltman*, 19 S. E. Rep. 109 (N. C.).

The authorities are in conflict upon this point. The doctrine of the case is law in New York and Pennsylvania. *Worrall v. Munn*, 5 N. Y. 229; *Alcorn's Executor v. Cook*, 101 Pa. St. 209. The contrary view is taken in Georgia and Maine. *Pollard and Co. v. Gibbs*, 55 Ga. 45; *Wheeler v. Nevins*, 34 Me. 54. It is submitted that the view taken in the principal case is the correct one. A seal has little of its former solemnity, and it seems more sound to reject it as surplusage where it is not essential to the validity of the instrument, but will render it void if not rejected. Its solemnity seems to be the only ground advanced for retaining it.

AGENCY—VICE-PRINCIPAL—FELLOW-SERVANT.—*Held*, that an engineer of a city steam-roller, who has a flagman under his orders and dischargeable by him, in carelessly starting the roller without warning, is the flagman's fellow-servant, not his vice-principal. *Hanna v. Granger*, 28 Atl. Rep. 659 (R. I.).

For comment on this case see 8 HARVARD LAW REVIEW, 57.

ASSIGNMENT FOR BENEFIT OF CREDITORS—RELEASE—EFFECT.—A general assignment by insolvent debtors provided for payment in full of such creditors as should accept its terms and execute releases within sixty days of its date, and for distribution of the balance of the assets among the other creditors. Plaintiff, a creditor, under the impression that he had complied with the requirements, executed a release under seal. Subsequently, upon a contest by the creditors, it was adjudged that he had in fact not complied with the requirements of the assignments. *Held*, that the release was none the less effectual to defeat his right of action on the original debt even though it was expressed to be executed in consideration of his having priority over the general creditors. *Claffin Co. v. Dacus*, 59 Fed. Rep. 998.

This is a hard case, but in a court of law no other result could have been reached. The release being under seal, the question of consideration becomes immaterial, and, no fraud being suggested, the debt is discharged absolutely. Possibly the plaintiff might be relieved in equity.

**CARRIERS — UNREASONABLE STIPULATION IN BILL OF LADING.** — *Held*, that a stipulation in a bill of lading requiring a written claim for loss or damage to be made within thirty days after the loss or damage occurs, covering a transit which may not unreasonably consume thirty days, is void for unreasonableness. *Central Vermont R. R. Co. v. Soper*, 59 Fed. Rep. 879 (Mass.).

It is well-settled law that a carrier may limit his liability by stipulating that notice of loss shall be given within a reasonable time. *Express Co. v. Caldwell*, 21 Wall. 264. In *Southern Express Co. v. Caperton*, 44 Ala. 101, it was held that thirty days from the date of the bill of lading was not a reasonable time, while a contrary decision on similar facts was reached in *United States Express Co. v. Harris*, 51 Ind. 127. Whether this time would ordinarily be considered reasonable or not, the decision in the principal case seems perfectly sound.

**CONSTITUTIONAL LAW — LEGISLATIVE POWERS — REFERENDUM.** — *Held*, that it was unconstitutional to provide that an act granting suffrage to women should take effect on approval of the voters either throughout the Commonwealth or in cities and towns; also that such an act cannot constitutionally provide that it shall take effect throughout the Commonwealth on acceptance of a majority of the voters, including women specially authorized to vote on this question alone. *In Re Municipal Suffrage to Women*, 36 N. E. Rep. 483 (Mass.).

For a discussion of this decision see 7 HARVARD LAW REVIEW, 485, and 8 HARVARD LAW REVIEW, 53.

**CONSTITUTIONAL LAW — RIGHT TO TRIAL BY JURY — STATUTORY PRESUMPTION.** — Missouri statute made it criminal for an officer of a bank to receive a deposit, knowing at the time that the bank was insolvent, and further provided that the failure of such bank should be "*prima facie* evidence" of knowledge on the part of such officer that the bank was insolvent when the deposit was received. *Held*, that the statute did not violate the Missouri Constitution which provided that "the right to trial by jury, as heretofore enjoyed, shall remain inviolate." *State v. Buck*, 25 S. W. Rep. 573 (Mo.).

The court follow *People v. Cannon*, 139 N. Y. 32, and bring out the fact, though not so clearly as is done by the New York court, that these statutory presumptions are not absolutely binding upon the jury, who are still at liberty to acquit, if they find the guilt is not proved beyond a reasonable doubt. See note on *People v. Cannon*, 7 HARVARD LAW REVIEW, 309.

**CONSTITUTIONAL LAW — STATE SENATE NOT A CONTINUOUS BODY.** — The constitution of New Jersey provides (1) that members of the state senate and assembly shall be elected yearly, and that the two houses shall meet separately on a certain day after the election, when the legislative year shall commence; (2) that the senate shall be composed of one senator from each county, elected by the voters of the county for three years; (3) that the senators shall be divided into three classes, so that one year the terms of the members of one class shall expire, and their successors be elected, and so on successively with each of the three classes. It was also provided by statute that in the organization of the two legislative bodies, certified copies of determination of elections shall be taken to be *prima facie* evidence of the right of persons therein mentioned to seats in the house. *Held*, that the senate was not a continuous body, so that a newly elected member could not enter it until his title had been passed on by the old members, but that it expired annually, and all members took part in its organization. *Atty. General ex rel. Werts, Governor, v. Rogers et al.* 28 Atl. Rep. 726 (N. J.).

The distinction drawn by Beasley, C. J., between the senate of the United States and the senate of New Jersey would seem to be a sound one. It proceeds on the ground that Art. I. sect. 3, cl. 2 of the Constitution of the United States merely imparts to the Federal senate the potentiality of permanent existence; while it is to such provisions as that contained in Art. I. sect. 3, cl. 4, giving to the senate an always existent presiding officer, that one must have recourse to prove the permanency of that body. The New Jersey Constitution has adopted the former, but not the latter, of these two clauses.

**CONTRACTS — ANTICIPATORY BREACH.** — Defendant contracted with plaintiff to secure to her by his will a life estate in certain lands. He aliened the lands. *Held*, that she could recover the present value of that estate. *Synge v. Synge* [1894], 1 Q. B. 467 (Eng.). See Notes.

**CONTRACTS — INTERFERENCE WITH.** — An action lies for persuasion, by defendant, inducing third persons to break contracts with plaintiff. It is not an action for slander



(which would be barred in two years by the statute) but for the malicious use of the words to the plaintiff's injury. *Van Horn v. Van Horn*, 28 Atl. Rep. 669 (N. J.) See Notes.

**CRIMINAL LAW — LARCENY — POSSESSION.** — A horse was borrowed to drive to church and while there was taken. *Held*, by the Court of Criminal Appeals of Texas, under statutes clearly declaratory of the common law, that such gratuitous bailee does not get possession, and consequently it is not necessary, to warrant a conviction, to show that the taking was without his consent. *Emerson v. State*, 25 S. W. Rep. 289 (Tex.).

It is submitted that such a bailee does get the actual control, care, and management necessary for possession. Such a decision as this would lead to most unsatisfactory results. The court was probably confused by the fact that the bailor is allowed to bring a possessory action, but such action would be for the wrong done to the bailee's possession. Story on Bailments, § 280.

**EVIDENCE — CONTRACT IN WRITING — COLLATERAL ORAL AGREEMENT.** — The defendant, a resident of Georgia, constituted X his attorney to make an exchange of lands of the defendant, situate in New York, for lands of the plaintiff lying in Georgia. The power of attorney contained "a full power of substitution and revocation." X and the plaintiff met and concluded a contract of exchange in writing, the deeds to be delivered at a certain time; and X stipulated orally that one Y should thereafter act for the defendant, and that plaintiff's performance should be made to him. At the time set plaintiff tendered her deeds to Y who made no objection to the manner of their execution, but requested plaintiff to wait and keep the matter open until the defendant's deeds should be forwarded. Subsequently the defendant, being anxious to avoid the contract, sought to impeach it on the ground that the deeds offered by the plaintiff were not executed according to the requirements of Georgia law, and moreover disputed the validity of the appointment of Y as his agent, and the agreement as to the place of performance of the plaintiff. *Held*, that the delegation of authority of X to Y was competent under the power of attorney, and that the oral agreement by which the substitution was made, and place of performance fixed, did not "contravene the terms of the written instrument." *Grillenberger v. Spencer*, 27 N. Y. Sup. 864.

The decision seems based on liberal and just conceptions of the equities of the case. According to a rigid doctrine, perhaps, the collateral oral agreement would be inadmissible on the ground that, the written instrument appearing complete, there was an irrebuttable presumption that it did contain all the negotiations of the parties on the subject (see the typical case of *Naumberg v. Young*, 44 N. J. 331). Such a summary rule, however, has been previously discountenanced in New York, as is seen by cases cited in the report, and also *Chapin v. Dobson*, 78 N. Y. 74, and, fairly considered, the oral agreement seems to be in no way inconsistent with either the spirit or language of the written contract.

**MORTGAGES — REDEMPTION.** — *Held*, that after foreclosure of a senior mortgage, and sale and conveyance under such foreclosure, a junior mortgagee, although he has not been a party to this foreclosure, cannot himself foreclose without first redeeming from the sale. *Rose v. James*, 36 N. E. Rep. 555 (Ill.).

The decision seems thoroughly sound. The court points out that the junior mortgage was only a claim upon the mortgagor's right of redemption. His right to foreclose was a right to have the mortgagor's right of redemption sold, but after this right of the mortgagor has been wiped out by the foreclosure proceeding, he could have no further right of foreclosing. However, he also had a right to redeem from the senior mortgagor, and this right could not be affected by a proceeding to which he was not a party, so that he might still redeem.

**NONSUIT — RIGHT TO — DISCRETION OF COURT.** — After a trial has begun the plaintiff has no absolute right to take a nonsuit, and the same lies in the liberal discretion of the court, but will be denied if the plaintiff has got in all his evidence and is not surprised by the defendant's evidence. The decision is based on the injustice of allowing the plaintiff to put the case beyond the power of the court, when it is in a position to decide it on the merits. *Johnson v. Bailey*, 59 Fed. Rep. 670 (Circuit Court, W. D. Wis.). The decision is avowedly contrary to the rule of common law, but is in accord with the decisions in several States.

**PERSONAL PROPERTY — ATTACHMENT — INFORMATION BY TELEPHONE.** — The attaching creditor being absent from the State, his attorney made the necessary affidavit, on information received from the creditor by a long-distance telephone. *Held*, that such information was sufficiently reliable, that received by telegraph being decided so, and that the attachment was rightly granted on the affidavit based thereon. *Murphy v. Juck*, 27 N. Y. Sup. 802.



Van Brunt, P. J., dissents. His opinion, however, fails to meet the case. The question is only as to the reliability of information received by the attorney; and certainly this is greater in the case of the telephone than in that of the telegraph. The existence of an original dispatch cannot affect the "information and belief" of the attorney who is to take immediate action upon the communication he receives. The decision of the majority seems sound.

**PERSONAL PROPERTY — CONSTRUCTION OF MARRIAGE SETTLEMENT.** — By a marriage settlement, property was assigned to trustees to hold for the wife during her life, and at her death, unless she should otherwise appoint, for such persons as would have been entitled thereto under the statutes for the distribution of intestate's estates if she had died intestate "without having been married." The wife had issue by the marriage and died without having executed her power of appointment. *Held*, on the authority of *Wilson v. Atkinson*, decided in the Court of Appeal in 1864 and reported 4 D. J. & S. 455, that the clause "without having been married," as used in the instrument of settlement, did not shut out the children of the marriage, and that the funds were held by the trustees for them. *Stoddart v. Saville*, L. R. [1894] Ch. Div. 480.

The obvious intention of the parties to the settlement was to exclude the husband only. This the court has accomplished by the above decision. Whether or not the terms of the instrument as expressed were susceptible of the interpretation here given them depends upon the decision of a very difficult question of construction upon which the court did not enter, since it considered itself bound to adopt the meaning of the phrase "without having been married" attributed to it in *Wilson v. Atkinson* by the Court of Appeal. It is submitted, however, that the court was not bound by that decision; that *Wilson v. Atkinson* was decided on peculiar facts, very different from those surrounding the case at bar; and that no general rule of construction was there laid down. See *Emmins v. Bradford*, L. R. 13 Ch. Div. 413.

**QUASI CONTRACTS — CLAIM AGAINST ESTATE — SERVICES RENDERED.** — The plaintiff's insane sister was brought by her guardian to live with the plaintiff, who gave up her former employment and took charge of her sister, the guardian paying the board of both until the latter's death. The plaintiff put in a claim for services, against her sister's estate. *Held*, the plaintiff can recover in the absence of any express agreement if the circumstances show that compensation was expected. *Fuller v. Mowry*, 28 Atl. Rep. 606 (R. I.). This case is clearly within the authorities in America.

**REAL PROPERTY — BREACH OF COVENANT OF WARRANTY.** — Plaintiff conveyed land to the defendant by warranty deed, and, in consideration thereof, took his note and a mortgage of the premises. *Held*, in an action brought on the note and for the foreclosure of the mortgage, that the breach of the warranty was no defence so long as the defendant retained possession of the land and of the deed of conveyance. *Black v. Thompson*, 36 N. E. Rep. 643 (Ind.).

The above decision is undoubtedly in accordance with the law. The defendant could set up a counter claim for all damages resulting from the breach of the warranty, but had no general defence against an action for the purchase money for the land. After the delivery of the title-deed the purchaser's only right to relief from defects, either at law or in equity, depends, in the absence of fraud, solely upon the covenants which he has made. Rawle on Covenants (3d edition) p. 612.

**REAL PROPERTY — PROFIT — TO DIG GRAVEL.** — By reservation in a deed from the common grantor, the plaintiff was entitled to take gravel from the defendant's land, and for several years had taken it from a certain gravel pit. *Held*, that the defendant had no right to prevent taking from this pit, though there were other places from which gravel might be taken with less damage to defendant's land. *Corliss v. Dunning*, 35 Pac. Rep. 1074 (Wash.).

There is a suggestion by the court that if a specific place, equally convenient for the plaintiff, had been pointed out by the defendant, the case would have been different. But even subject to this limitation the decision is too broad. The plaintiff should be required to exercise his right in such place as least to injure the defendant, if it be reasonably convenient though not equally so.

**REAL PROPERTY — CONSTRUCTION OF WILL — EXTRINSIC EVIDENCE.** — Testator left residue to "my niece E. W." *Held*, that the court could inform itself by extrinsic evidence that testator had no niece E. W., and that his wife had a legitimate grand-niece E. W. But an object for the testator's bounty having been thus procured, the court refused to receive evidence of surrounding circumstances tending to show that the wife's illegitimate grand-niece, also named E. W., who had lived with him and taken care of him, was the person meant. *Re Fish, Ingham v. Rayner*. In the Court of Appeal (Lindley, Kay, A. L. Smith) 38 Sol. L. J. 307. See Notes.

**REAL PROPERTY—CONVEYANCE OF A WAY.**—A piece of land was laid out, and a lot sold to X fronting on one of the plotted streets; and the question now is whether the grantor's heirs or the grantees are entitled to the compensation, paid by the city in condemnation proceedings for one-half the "street." *Held*, the grantee is entitled; the street laid out, though not opened, is a street as to the grantee, and the same reasons exist for having the title pass to the centre as in the case of a highway, even though the lines of the plot are along the edge of the way. *Anthony v. Providence*, 28 Atl. Rep. 766 (R. I.).

The case is a sound one and contains a good discussion of the principles on which this rests, yet it seems odd that the court does not recognize the fact that the opposite view is taken as this question was up for the first time in R. I. In accord with principal case see *Bissell v. R. R.*, 23 N. Y. 61; *Fisher v. Smith*, 9 Gray, 441 (Mass.). *Contra*, *Leigh v. Jack*, L. R. 5 Ex. Div. 264; *Bangor House v. Brown*, 33 Me. 309.

**PROPERTY—LAND BUILT UPON BY A RAILROAD COMPANY—EJECTMENT BY OWNER.**—Defendant company, without any right, entered upon plaintiff's land and erected a depot thereon. After having allowed the company to occupy the land for five years, plaintiff now brings ejectment. *Held*, that plaintiff's remedy is confined to damages, the possession of the land not being recoverable on grounds of public policy. *L., N. A., and C. R. R. Co. v. Berkey*, 36 N. E. Rep. 642 (Ind.).

There seems to be no necessity of putting this case on grounds of public policy, for the same decision could be reached by holding that plaintiff had given defendant a license, which he is estopped from revoking after valuable improvements made under it. If the view taken in this case is followed out, it would seem that plaintiff could not maintain ejectment irrespective of his knowledge of or acquiescence in the use of his land. The cases hardly go that length. Wood on Railroads (Minor's ed., 1894), 927.

**REAL PROPERTY—WILLS—RULE AGAINST PERPETUITIES.**—In this case the testator, after reciting the misdeeds of his son, devises property to trustees to be paid to the unborn children of such son, at age of twenty-four in the case of males, and to the female children upon marriage, with an alternative devise in case his son died without issue,—which in fact happened. The Circuit Court of West Va. held the whole was void for perpetuity. *Held*, that the decree should be reversed on the ground that the son having in fact died without issue, the alternative devise should take effect without regard to the fact that the other limitation which failed could have been impeached for remoteness. *Perkins et al. v. Fisher et al.*, 59 Fed. Rep. 801 (W. Va.).

The decision is undoubtedly correct, and shows a clear knowledge of the rather arbitrary and refined rules of law on the subject. It is a general proposition that a limitation which in itself may prove too remote, is void *ab initio*, but this is held not to vitiate another limitation dependent on an alternative contingency which must happen, if at all, within the bounds of remoteness. The language of the court in the case of *Jackson v. Phillips*, 14 Allen, 572, cited in the report, brings out the point with much clearness.

**TORTS—DANGEROUS PREMISES—TRESPASSER.**—A constable entered the defendant's building to serve a civil writ against a person whom he supposed to be therein, but who in fact was not there, and fell down a dark stairway. *Held*, that he is a mere trespasser and cannot recover for his injuries. *Blatt v. McBarron*, 36 N. E. Rep. 468 (Mass.).

The case of an officer with a warrant for arrest is distinguished, and the distinction is a valid one. The public has a direct interest in the immediate apprehension of criminals, while in a civil action the parties alone are interested, and the officer acts rather as an agent of the complaining party.

**TORTS—DECEIT—MISREPRESENTATION OF VALUE.**—Defendant fraudulently altered a written statement of a third party as to the value of certain property. Plaintiff, who resided at some distance from the property, entered into a contract of sale, relying on this statement. *Held*, the contract will be set aside. *McKnight v. Thompson*, 58 N. W. Rep. 453 (Neb.).

The decision is clearly correct. The false representation was concerning the opinion of a third party; plaintiff acted relying solely on the altered statement; and the alteration was designed to prevent him from examining the property.

**TORTS—IMPUTED NEGLIGENCE.**—*Held*, that the negligence of the driver of a private conveyance is imputable to one who is voluntarily driving with him, so as to defeat an action against a third party, whose negligence, together with that of the driver, caused the injuries for which damages are sought. *Whittaker v. City of Helena*, 35 Pac. Rep. 904 (Mont.).

The decision in this case is rested principally on *Prideaux v. Mineral Point*, 43 Wis. 513, where it is laid down that the driver in a case like this is the agent of the one



voluntarily accompanying him. This, if true, would make the person voluntarily accompanying the driver responsible for the driver's negligence to third parties, as has been pointed out in the case of public conveyances in *The Bernina* [1887], L. R. 12 Prob. Div. 58. But such a result was probably not intended by the court. It would seem better, in a jurisdiction where this matter comes up for the first time, to adopt the rule that only actual contributory negligence can defeat an action like the present.

**TORTS — CONVERSION.** — The plaintiff held a chattel mortgage on sheep belonging to X. The defendant "instigated" X to sell the sheep; which was done, and the defendant collected the money. *Held*, that the defendant was liable for conversion of the sheep. *Cone v. Iverson*, 35 Pac. Rep. 933 (Wy.).

The case seems to be a rather startling one. The line of reasoning adopted by the court was to the effect that by the mortgage plaintiff became the conditional owner of the sheep, and that when the defendant successfully instigated X to sell he was guilty of conversion to his own use. The citations on the point are the well known rules of criminal law to the effect that the procurer of a crime is liable as principal, also *Henderson v. Foy*, 11 So. Rep. 441 (Ala.), in support of the proposition that an analogous rule prevails in regard to civil wrongs. No express attempt is made to show that X acted as agent of the defendant, nor does it appear that the defendant ever had the sheep in his possession. Conaway, J., dissented and held that the proper remedy against the defendant would be to hold him liable as constructive trustee for the plaintiff for money received. It is submitted that the latter view is more in accordance with established usage. The majority of the court show great breadth and lenity in interpreting the pleadings in the case, on the ground that the statutes of the State have given them this power.

**TRUSTS — TRUST FOR MAINTENANCE AND SUPPORT — RIGHTS OF CREDITORS.** — A devise to an executor in trust directed him to expend one half the net income "for the benefit of my son Cassius and his family" or in the executor's discretion to pay any part thereof to Cassius in cash. The children of the family to be educated and maintained "on a scale comporting with their condition and rank in life;" and if, in the executor's judgment, the entire half of such income could not be thus expended judiciously, the surplus to be held in trust so that it might be applied, as the executor might deem best, for the benefit of "Cassius and his family." *Held*, that this was a gift for the mere maintenance and support of Cassius and his family collectively, and Cassius had no separable interest in such income which could be subjected by his creditors. *Brooks et al. v. Reynolds*, 59 Fed. Rep. 923 (Ohio).

This decision reverses the judgment given in this case by Jackson, J., in the Circuit Court (*Reynolds v. Hanna*, 55 Fed. Rep. 783). The difference of opinion is founded more upon the construction of the will than upon the law applicable to cases of spend-thrift trusts. In the principal case the conclusion reached is that "the dominating purpose of the testator in founding this trust was to provide for the support and maintenance of Cassius and his family collectively." The two important points would seem to be that the income was not to be paid into the hands of Cassius save in the absolute discretion of the trustee, but was to be expended by the trustee; and again that it lay within the power of the trustee to expend only a part of the income at his discretion. By the construction given the will in the court below it was brought within the extreme English doctrine as to bequests for the maintenance and support of more than one cestui que trust. *Page v. Way*, 3 Beav. 20; *Kearsley v. Woodcock*, 3 Hare, 185; *Wallace v. Anderson*, 16 Beav. 533; *Lewin on Trusts*, 7th ed. 91. But see *Bell v. Watkins*, 82 Ala. 512; *Tolland Co. v. Underwood*, 50 Conn. 493. Assuming that the court were correct in their construction of the will in the principal case it would seem that the decision is in accordance with the weight of authority both in England and in this country. *Twopenny v. Payton*, 10 Sim. 487; *Codden v. Crowhurst*, id. 642; *Holmes v. Penny*, 3 Kay & J. 90; *Slattery v. Wason*, 151 Mass. 266; *Jourdelomon v. Massengill*, 86 Tenn. 88; *State v. Hicks*, 92 Mo. 439. For an exhaustive and admirable discussion of this subject see Gray, *Restraints on Alienation*, §§ 134-277 a.



## REVIEWS.

HAND-BOOK OF CRIMINAL LAW. By Wm. L. Clark, Jr. 8vo. pp. xi., 450.  
St. Paul: West Publishing Co. 1894.

It seems a pity that many lawyers or law-students should be satisfied with a "hand-book" on so important a branch of the law; but the enterprising publishers of this manual have no doubt assured themselves in advance of a sale. Such a book might be read as a preparation for study of the law of Crime; and if its statements were as accurate as they are broad, it might be handy for review. That any one, even by committing bodily to memory the concise formulæ of its "black-letter text," should get to know much about Criminal Law is as unlikely as that one who has the formulæ of the Differential Calculus carefully drawn off in his memorandum book should thereby become master of that branch of mathematics.

The author shows facility at formulating rules clearly and concisely, and wisely gives considerable space to general principles. As might be expected, he slips easily over the difficulties of the subject. Thus the important question of the intent required in statutory crimes is dismissed in a few sentences, and contradictory decisions are cited side by side, without a hint of the fundamentally conflicting theories (p. 70). The anomalous doctrine of the Massachusetts court is stated without comment, as if it were everywhere acquiesced in; and *Regina v. Tolson* (23 Q. B. D. 168) is not even referred to in this connection. Nor does Mr. Clark hesitate to state (p. 358) that the territorial limits of a country extend outward into the ocean a marine league, though a majority of the judges in *Regina v. Keyn* (2 Ex. D. 63) thought otherwise, after one of the most elaborate discussions to be found in the books. Mr. Clark does not cite the case.

The subject of Larceny tests the extent of one's knowledge of the law of Crime; and here the author shows some lack of familiarity with his material. One cannot be expected to reach accurate results who starts with the following definitions (p. 249): "Possession is the present right and power to control a thing." "Property in a thing is the right to possession, coupled with an ability to exercise that right." With such notions he may well believe that fraud vitiates the owner's consent to the original taking, and makes it a trespass (p. 250). But this misconception will hardly excuse the statement, in the discussion of "Receiving Stolen Goods," that "the fact that the goods were stolen in another State is immaterial" (p. 289), citing in support of it a case which assumes the contrary to be true.

J. H. B.

**CASES ON CONSTITUTIONAL LAW.** With Notes. By James Bradley Thayer, LL.D., Weld Professor of Law at Harvard University. Cambridge: Charles W. Sever. 1894. 8vo. Part I., pp. xi, 1-448. Part II., pp. ix., 449-944.

**ILLUSTRATIVE CRIMINAL CASES.** By Joseph Henry Beale, Assistant Professor of Law in Harvard University. Cambridge: The Harvard Law Review Publishing Association. 1894. Octavo, pp. 197.

These two widely different books are, when taken together, strong evidence of the catholic nature of the case system, — evidence that it is not a trick of times and men, but a method capable of almost as many different uses as there are ways of good teaching. Professor Beale's book may be dismissed with this word, being only a selection of eighty or so of the more important criminal cases, designed to be a case-book for those students who have little time to give to the study of this subject, and well suited to put the necessary principles before them.

Professor Thayer's are perhaps the most elaborate of all the case-books. Here, not content with the selection and condensation of the cases, he has taken case, treatise, and tract, and welded them together into a book which, with all the advantages of the case system, is yet almost like a text-book in its continuity and fulness. This is especially true of Part I., which is designed to be complete in itself as an answer to the question, What is a Constitution? so that besides the American discussions of rigid, skeleton-like instruments, it contains material collected from every source apt to illustrate the study of systems of fundamental law. It seems more than likely that this Part will be used outside of law schools in the more academic study of Constitutional Law, such, for instance, as goes on college courses in United States History.

Part II. contains Chapter IV. on the later amendments and fundamental civil rights, and Chapter V. on "Unclassified Legislative Power, — the so-called Police Power." Part III. is announced to appear in the early, and Part IV. in the late autumn.

Next after the brevity which has been secured in a subject usually so diffusely treated, the noteworthy thing in the selections is the fact that they are thoroughly readable; the cases are not considerations of the technical doctrines of law, but treatises on politics in the old and best sense of the word, and they are interesting to any one who wants to know about government, as well as to those who look at its legal side.

R. W. H.

**JURIDICAL EQUITY ABRIDGED, FOR THE USE OF STUDENTS.** By Charles E. Phelps, Professor of Juridical Equity in the University of Maryland, and Associate Judge of the Supreme Bench of Baltimore. Baltimore: M. Curlander, 1894. 8vo. pp. xxxii., 373.

One cannot but be prepossessed in favor of this book by the modest disclaimer of the preface, where the author says: "It does not profess to be an exhaustive treatise. It does not offer to compete with any existing work. It may be called a horn-book, nothing more." As an introduction to the fuller treatises of Adams, Pomeroy, or Story, the work in question has marked merits; and this is especially true of Part II., on Equity Jurisprudence. Much of it is written with a due sense of proportion, — all topics not being treated as of equal importance. It is unconventional. The author speaks in his own words, and with no uncertain



sound. It is not overweighted by reverence for previous commentators, however distinguished. With Judge Phelps, the name of Sir William Blackstone is not a match for the conclusions of common-sense. While, in solid weight of contents, the book may be inferior to some other elementary treatises on the same subject, it has the great merit of "readableness." The writer has "the art of putting things" in a form likely to be both read and remembered. Witness his comparison of the Court of Chancery, *tempore* Eldon, to "a ship built for high speed, with engines of enormous power and corresponding appetite, but so fouled with barnacles and weeds as to be slow beyond endurance."

There is room to differ from Judge Phelps upon the question what is the most important distinction between the methods of equity and law. He names the absence of a jury; while Professor Langdell emphasizes the rule that equity acts *in personam*. (Compare sections 22, 142, and 221).

In a book "designed primarily for the Maryland law student," it is not to be wondered at that many details of procedure should be given, or that some of those details should differ from the practice in other jurisdictions. But the value of the book to students at large is thus somewhat impaired; and there is, to some extent, a failure to give special prominence to the salient points common to equity procedure everywhere. However, after making all reasonable allowance for defects, this work cannot fail to prove a serviceable First Book in Equity.

J. S.

THE CRIMINAL CODE OF CANADA. By James Crankshaw, B. C. L. Montreal: Whiteford & Theoret. 8vo. pp. lxxxviii., 976. 1894.

This volume is designed to present in a popular manner a full general view of the criminal law and criminal procedure under the Canadian Code. There is very little that is original in the book. In fact, it is not much more than a collection of well-selected extracts from the standard text-books and important decisions, with numerous abstracts of cases to furnish illustrations, so arranged under appropriate sections as to constitute as far as may be a continuous discussion of the Code. Mr. Crankshaw has added nothing new to the learning on the criminal law, and has been content simply to present the views of others. The volume, nevertheless, is of value in furnishing a more ready reference to the authorities with respect to the new system, and must be commended for its skilful and attractive arrangement of the material of others.

The most interesting part of the book is the Code itself. It was founded on the English Draft Code of 1880, which was the last of the many efforts, beginning as early as 1833, to codify the criminal law in England. The work of the Canadian Parliament was therefore comparatively easy, and how much the legislators were indebted to the mother country may be gathered from the instructive reports of the House Debates on the Code given at some length in the appendix of Mr. Crankshaw's volume. The Code has made several important changes in the common law. It abolished the distinction between principals and accessories before the fact, discontinued the use of those technical words "malice" and "maliciously," substituted the word "theft" as a general term to comprise all acts of fraudulent taking and of fraudulent conversion, misappropriation, and breach of trust, and put an end to the arbitrary distinction between felonies and misdemeanors. In view of the fact that codification of



the common law is destined to become very general in this country, the Canadian Code will be examined with much profit, and Mr. Crankshaw's book affords an excellent means for doing so.

H. A. R.

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THE PATTEE SERIES, ILLUSTRATIVE CASES FOR LAW SCHOOL USE. By W. S. Pattee, LL.D., Dean of College of Law, University of Minn. Phila.: T. & J. W. Johnson & Co. 1893. CONTRACTS. 8vo. pp. 527. PERSONALTY. Part I. 8vo. pp. 196. PERSONALTY. Part II. Sales. 8vo. pp. 412. DOMESTIC RELATIONS. By Prof. Jas. Paige, LL.M., of the same College. 8vo. pp. 471. REALTY. Part I. Land. 8vo. pp. 177. PARTNERSHIP. By Professor Paige. 8vo. pp. 238.

These cases are intended for use in connection with instruction by text-books or lectures. In this way the editor believes "the advantages of the 'case-system' may be realized without forfeiting those of the other system." The cases are not intended to be merely corroborative of what the teacher or writer has said, but to constitute in themselves distinct sources of information. With very few exceptions the selections are from American reports, and do not give the pleadings or arguments of counsel. Each group of cases is preceded by a brief and general statement of the principle intended to be illustrated. The difficulty occasionally met in making such brief generalizations accurate also demonstrates the value of the cases. The order of exposition is that adopted by most text-book writers. In the volume on Contracts it would seem that better results could have been reached by departing from the traditional order, and treating quasi-contracts separately.

Parts II. and III. of the cases on Reality, entitled "Estate in Land," and "Title to Land" are in press, and are soon to be followed by volumes on Torts, Pleading, Agency, Criminal Law, and Commercial Paper.

In Law Schools where the instruction is imparted chiefly by lectures, with text-books as a basis, these volumes will be found a useful supplement.

F. B. W.

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A TREATISE ON THE LAW OF MORTGAGES OF REAL PROPERTY. By Leonard A. Jones. Fifth Edition. Boston: Houghton, Mifflin & Co. 1894. 2 vols. Octavo, pp. xv., 967; vi., 1012. \$12.00.

The customary additions of recent cases have been made, and fortified, as with the last editions of Mr. Jones's other books, with references to all the regular reports of each case. In this edition Vendor's Liens finally disappear, the subject being considered by the author as more appropriately covered in his treatise on Liens. Detailed statements of registration statutes are also omitted, and their place supplied by the rewriting and enlargement of the chapters on the general law of registration and notice.

In general, the method of arrangement and of detailed treatment is the same as in Mr. Jones's other books. In § 436 a it is said that "chattels may be of such a character . . . that they will lose their character as personalty if they are annexed with the intention of the owner of the equity and of the person interested in the chattels that they should retain their

original character." If, as is necessary to make this mean much, "will lose" is a misprint for "will not lose," this is a statement of a doctrine that the line drawn by the law between real and personal property can be moved about at the pleasure of "the owner of the equity and of the person interested in" particular kinds of chattels. The case cited (*Union Trust Co. v. Tel. Co.*, 36 Fed. Rep. 288) states the test to be whether a thing "can be removed without material injury to the structure." This is the sweeping view (which Mr. Jones does not hold) that all fixtures may be personalty by agreement. But the view stated in the text that some may be and some may not is peculiar.

R. W. H.

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## THE ORIGIN OF USES.

THE following account of the origin of our English *Use* forms part of a projected sketch of English law as it stood at the accession of Edward I. It will there follow some remarks upon the late growth of any doctrine of informal agency, by which I mean an agency which is not solemnly created by a formal *attornatio*. I have long been persuaded that every attempt to discover the genesis of our *use* in Roman law breaks down, and I have been led to look for it in another direction by an essay which some years ago Mr. Justice Holmes wrote on Early English Equity (Law Quarterly Review, vol. i.). Whether I have been successful, it is not for me to say. I will first state my theory and then adduce my evidence.

The germ of agency is hardly to be distinguished from the germ of another institution which in our English law has an eventful future before it, the 'use, trust or confidence.' In tracing its embryonic history we must first notice the now established truth that the English word *use* when it is employed with a technical meaning in legal documents is derived, not from the Latin word *usus*, but from the Latin word *opus*, which in Old French becomes *os* or *oes*. True that the two words are in course of time confused, so that if by a Latin document land is to be conveyed to the use of John, the scribe of the charter will write *ad opus Johannis* or *ad usum Johannis* indifferently, or will perhaps adopt the fuller formula *ad opus et ad usum*, nevertheless the earliest history of 'the use' is the early history of the phrase *ad opus*. Now this both in



France and in England we may find in very ancient days. A man will sometimes receive money to the use (*ad opus*) of another person; in particular money is constantly being received for the king's use. Kings must have many ministers and officers who are always receiving money, and we have to distinguish what they receive for their own proper use (*ad opus suum proprium*) from what they receive on behalf of the king. Further, long before the Norman Conquest we may find a man saying that he conveys land to a bishop to the use of a church, or conveys land to a church to the use of a dead saint. The difficulty of framing a satisfactory theory touching the whereabouts of the ownership of what we may loosely call 'the lands of the churches' (a difficulty that I cannot here pause to explain) gives rise to such phrases. In the thirteenth century we commonly find that where there is what to our eyes is an informal agency, this term *ad opus* is used to describe it. Outside the ecclesiastical sphere there is but little talk of 'procuration'; there is no current word that is equivalent to our *agent*; John does not receive money or chattels 'as agent for' Roger; he receives it to the use of Roger (*ad opus Rogeri*).

Now in the case of money and chattels a certain haziness in the conception of ownership, which I hope to discuss elsewhere, prevents us from making a satisfactory analysis of the notion that this *ad opus* implies. William delivers two marks or three oxen to John, who receives them to the use of Roger. In whom, we may ask, is the ownership of the coins or of the beasts? Is it already in Roger; or, on the other hand, is it in John, and is Roger's right a merely personal right against John? In the thirteenth century this question does not arise in a clear form, because possession is far more important than ownership. We will suppose that John is the bailiff of one of Roger's manors, that in the course of his business he has gone to a market, has sold Roger's corn, has purchased cattle with the price of the corn and is now driving them home. We take it that if a thief or trespasser swoops down and drives off the beasts, John can bring an appeal or an action and call the beasts his own proper chattels. We take it that he himself cannot steal the beasts; even in the modern common law he can not steal them until he has in some way put them in his employer's possession. We are not very certain that if he appropriates them to his own use Roger has any remedy except in an action of debt or of account, in which his claim can be satisfied by a money payment. And yet the notion that the beasts are Roger's,

not John's, is growing and destined to grow. In course of time the relationship expressed by the vague *ad opus* will in this region develop into a law of agency. In this region the phrase will appear in our own day as expressing rights and duties which the common law can protect and enforce without the help of any 'equity.' The common law will know the wrong that is committed when a man 'converts to his use' (*ad opus suum proprium*) the goods of another; and in course of time it will know the obligation which arises when money is 'had and received to the use' of some person other than the recipient.

It is otherwise in the case of land, for there our old law had to deal with a clearer and intenser ownership. But first we must remark that at a very remote period one family at all events of our legal ancestors have known what we may call a trust, a temporary trust, of lands. The Frank of the Lex Salica is already employing it; by the intermediation of a third person, whom he puts in seisin of his land and goods, he succeeds in appointing or adopting an heir. Along one line of development we may see this third person, this 'saleman,' becoming the testamentary executor of whom this is not the place to speak; and our English law by forbidding testamentary dispositions of land has prevented us from obtaining many materials in this quarter. However, in the England of the twelfth century we sometimes see the lord intervening between the vendor and the purchaser of land. The vendor surrenders the land to the lord 'to the use' of the purchaser by a rod, and the lord by the same rod delivers the land to the purchaser. Freeholders, it is true, have soon acquired so large a liberty of alienation that we seldom read of their taking part in such surrenders; but their humbler neighbors, for instance, the king's sokeman, are constantly surrendering land 'to the use' of one who has bought it. What if the lord when the symbolic stick was in his hand refused to part with it? Perhaps the law had never been compelled to consider so rare an event; and in these cases the land ought to be in the lord's seisin for but a moment. However, we soon begin to see what we can not but call permanent 'uses'. A slight but unbroken thread of cases, beginning while the Conquest is yet recent, shows us that a man will from time to time convey his land to another 'to the use' of a third. For example, he is going on a crusade, and wishes that his land shall be held to the use of his children, or he wishes that his wife or his sister shall enjoy the land, but doubts, it may be, whether a woman can hold a military fee or whether a hus-



band can enfeoff his wife. Here there must be at the least an honorable understanding that the trust is to be observed, and there may be a formal 'interposition of faith.' Then, again, we see that some of the lands and revenues of a religious house have often been devoted to some special object; they have been given to the convent 'to the use' of the library or 'to the use' of the infirmary, and we can hardly doubt that a bishop will hold himself bound to provide that these dedications, which are sometimes guarded by the anathema, shall be maintained. Lastly, in the early years of the thirteenth century the Franciscan friars came hither. The law of their being forbade them to own anything; but they needed at least some poor dormitory, and the faithful were soon offering them houses in abundance. A remarkable plan was adopted. They had come as missionaries to the towns; the benefactor who was minded to give them a house, would convey that house to the borough community 'to the use of' or 'as an inhabitation for' the friars. Already when Bracton was writing, a considerable number of plots of land in London had been thus conveyed to the city for the benefit of the Franciscans. The corporation was becoming a trustee. It is an old doctrine that the inventors of 'the use' were 'the clergy' or 'the monks.' We should be nearer the truth if we said that to all seeming the first persons who in England employed 'the use' on a large scale were, not the clergy, nor the monks, but the friars of St. Francis.

Now in few, if any, of these cases can the *ad opus* be regarded as expressing the relation which we conceive to exist between a principal and an agent. It is intended that the 'feoffee to uses,' (we can employ no other term to describe him,) shall be the owner or legal tenant of the land, that he shall be seised, that he shall bear the burdens incumbent on owners or tenants, but he is to hold his rights for the benefit of another. Such transactions seem to have been too uncommon to generate any definite legal theory. Some of them may have been enforced by the ecclesiastical courts. Assuredly if the citizens of London had misappropriated the lands conveyed to them for the use of the friars, those darlings of popes and kings, they would have known what an interdict meant. Again, in some cases the feoffment might perhaps be regarded as a 'gift upon condition,' and in others a written agreement about the occupation of the land might be enforced as a covenant. But at the time when the system of original writs was taking its final form 'the use' had not become common enough to find a comfort-



able niche in the fabric. And so for a while it lives a precarious life until it finds protection in the 'equitable' jurisdiction of the chancellors. If in the thirteenth century our courts of common law had already come to a comprehensive doctrine of contract, if they had been ready to draw an exact line of demarcation between 'real' and 'personal' rights, they might have reduced 'the use' to submission and found a place for it in their scheme of actions; in particular, they might have given the feoffor a personal, a contractual, action against the feoffee. But this was not quite what was wanted by those who took part in these transactions; it was not the feoffor, it was the person whom he desired to benefit (the *cestui que use* of later days) who required a remedy, and moreover a remedy that would secure him not money compensation but the specific enjoyment of the thing granted. 'The use' seems to be accomplishing its manifest destiny when at length after many adventures it appears as 'equitable ownership.'

I will now put in some of the evidence that I have collected:—

I. The emp'oyment of the phrase *ad opus meum* (*tuum, suum*) as meaning on my (your, his) behalf, or for my (your, his) profit or advantage can be traced back into very early Frankish formulas. See Zeumer's quarto edition of the *Formulae Merovingici et Karolini Aevi* (*Monumenta Germaniae*), index s. v. *opus*. Thus, e. g.:—

p. 115 'ut nobis aliquid de silva ad opus ecclesiae nostrae . . . dare iubeatis.' (But here *opus ecclesiae* may mean the fabric of the church.)

p. 234 'per quem accepit venerabilis vir ille abba ad opus monasterio suo [= monasterii sui] . . . masas ad commanendum.'

p. 208 'ad ipsam iam dictam ecclesiam ad opus sancti illius . . . dono.'

p. 315 (An emperor is speaking) 'telonium vero, excepto ad opus nostrum inter Q et D vel ad C [*place names*] ubi ad opus nostrum decima exigitur, aliubi eis ne requiratur.'

II. So in Carolingian laws for the Lombards. *Mon. Germ. Leges*, iv. *Liber Papiensis Pippini* 28 (p. 520): 'De compositionibus quae ad palatium pertinent: si comites ipsas causas convenerint ad requirendum, illi tertiam partem ad eorum percipiant opus, duos vero ad palatium.' (The *comes* gets 'the third penny of the county' for his own use.)

*Lib. Pap. Ludovici Pii* 40 (p. 538): 'Ut de debito quod ad opus nostrum fuerit wadiatum talis consideratio fiat.'

III. From Frankish models the phrase has passed into Anglo-Saxon land-books. Thus, e. g.:—

Coenulf of Mercia, A. D. 809, *Kemble, Cod. Dipl.* v. 66: 'Item in alio loco dedi eidem venerabili viro ad opus praefatae Christi ecclesiae et monachorum ibidem deo servientium terram . . .'

Beornwulf of Mercia, A. D. 822, Kemble, Cod. Dipl. v. 69: 'Rex dedit ecclesiae Christi et Wulfredo episcopo ad opus monachorum . . . villam Godmeresham.'

IV. It is not uncommon in Domesday Book. Thus, *e. g.*:—

D. B. i. 209: 'Inter totum reddit per annum xxii. libras . . . ad firmam regis . . . Ad opus reginae duas uncias auri . . . et i. unciam auri ad opus vicecomitis per annum.'

D. B. i. 60 b: 'Duae hidae non geldabant quia de firma regis erant et ad opus regis calumniatae sunt.'

D. B. ii. 311: 'Soca et saca in Blideburh ad opus regis et comitis.'

V. A very early instance of the French *al os* occurs in Leges Willelmi, i. 2. § 3: 'E cil francs hom . . . seit mis en forfeit el cunté afert al os le vescuente en Denelahe xl. ores . . . De ces xxxii ores averad le vescuente al os le rei x. ores.' The sheriff takes certain sums for his own use, others for the king's use. This document can hardly be of later date than the early years of cent. xii.

VI. In order to show the identity of *opus* and *os* or *oes* we may pass to Britton, ii. 13: 'Villénage est tenement de demeynes de chescun seigneur baillé a tenir a sa voluté par vileins services de emprouwer al oes le seignür.'

VII. A few examples of the employment of this phrase in connection with the receipt of money or chattels may now be given.

Liberate Roll 45 Hen. III. (Archaeologia, xxviii. 269): Order by the king for payment of 600 marks which two Florentine merchants lent him, to wit, 100 marks for the use (*ad opus*) of the king of Scotland and 500 for the use of John of Britanny.

Liberate Roll 53 Hen. III. (Archaeologia, xxviii. 271): Order by the king for payment to two Florentines of money lent to him for the purpose of paying off debts due in respect of cloth and other articles taken 'to our use (*ad opus nostrum*)' by the purveyors of our wardrobe.

Bracton's Note Book, pl. 177 (A. D. 1222): A defendant in an action of debt confesses that he has received money from the plaintiff, but alleges that he was steward of Roger de C. and received it *ad opus eiusdem Rogeri*. He vouches Roger to warranty.

Selby Coucher Book, ii. 204 (A. D. 1285): 'Omnibus . . . R. de Y. ballivus domini Normanni de Arcy salutem. Noveritis me recepisce duodecim libras . . . de Abbate de Seleby ad opus dicti Normanni, in quibus idem Abbas ei tenebatur . . . Et ego . . . dictum abbatem . . . versus dominum meum de supradicta pecunia indempnem conservabo et adquietabo.'

Y. B. 21-2 Edw. I. p. 23: 'Richard ly bayla les chateus a la oes le Eveske de Ba.'

Y. B. 33-5 Edw. I. p. 239: 'Il ad conté qe eux nous livererent meyme largent al oes Alice la fille B.'

## VIII. We now turn to cases in which land is concerned :—

Whitby Cartulary, i. 203-4 (middle of cent. xii.) : Roger Mowbray has given land to the monks of Whitby ; in his charter he says 'Reginaldus autem Puer vendidit ecclesiae praefatae de Wyteby totum ius quod habuit in praefata terra et reliquit michi ad opus illorum, et ego reddidi eis, et saisivi per idem lignum per quod et recepi illud.'

Burton Cartulary, p. 21, from an 'extent' which seems to come to us from the first years of cent. xii. : 'tenet Godfridus viii. bovatae [*corr.* bovatas] pro viii. sol. praeter illam terram quae ad ecclesiam iacet quam tenet cum ecclesia ad opus fratris sui parvuli, cum ad id etatis venerit ut possit et debeat servire ipsi ecclesiae.'

Ramsey Cartulary, ii. 257-8, from a charter dated by the editors in 1080-7 : 'Hanc conventionem fecit Eudo scilicet Dapifer Regis cum Ailsio Abbate Ramesiae . . . de Berkeforde ut Eudo habere deberet ad opus sororis suae Muriellae partem Sancti Benedicti quae adiacebat ecclesiae Ramesiae quamdiu Eudo et soror eius viverent, ad dimidium servitium unius militis, tali quidem pacto ut post Eudonis sororisque decessum tam partem propriam Eudonis quam in eadem villa habuit, quam partem ecclesiae Ramesiae, Deo et Sancto Benedicto ad usum fratrum eternaliter . . . possidendam . . . relinqueret.' In D. B. i. 210 b, we find 'In Bereforde tenet Eudo dapifer v. hidas de feodo Abbatis [de Ramesy].' So here we have a 'Domesday tenant' as 'feoffee to uses.'

Ancient Charters (Pipe Roll Soc. p. 21 (*circ.* A. D. 1127) ; Richard Fitz Pons announces that having with his wife's concurrence disposed of her marriage portion, he has given other lands to her ; 'et inde saisivi Milonem fratrem eius loco ipsius ut ipse eam manuteneat et ab omni defendat iniuria.'

Curia Regis Roll No. 81, Trin. 6 Hen. III. m. 1 d. Assize of mort d'ancestor by Richard de Barre on the death of his father William against William's brother Richard de Roushal for a rent. Defendant alleges that William held it in *custodia*, having purchased it to the use of (*ad opus*) the defendant with the defendant's money. The jurors say that William bought it to the use of the defendant, so that William was seised not in fee but in wardship (*custodia*). An attempt is here made to bring the relationship that we are examining under the category of *custodia*.

Bracton's Note Book, pl. 999 (A. D. 1224) : *R*, who is going to the Holy Land, commits his land to his brother *W* to keep to the use of his (*R*'s) sons (*commisit terram illam W ad opus puerorum suorum*) ; on *R*'s death his eldest son demands the land from *W*, who refuses to surrender it ; a suit between them in a seigniorial court is compromised ; each of them is to have half the land.

Bracton's Note Book, pl. 1683 (A. D. 1225) : *R* is said to have bought



land from *G* to the use of the said *G*. Apparently *R* received the land from *G* on the understanding that he (*R*) was to convey it to *G* and the daughter of *R* (whom *G* was going to marry) by the way of a marriage portion.

Bracton's Note Book, pl. 1851 (A. D. 1226-7): A man who has married a second wife is said to have bought land to the use of this wife and the heirs of her body begotten by him.

Bracton's Note Book, pl. 641 (A. D. 1231): It is asserted that *E* impleaded *R* for certain lands, that *R* confessed that the land was *E*'s in consideration of 12 marks, which *M* paid on behalf of *E*, and that *M* then took the land to the use (*ad opus*) of *E*. Apparently *M* was to hold the land in gage as security for the 12 marks.

Bracton's Note Book, pl. 754 (A. D. 1233): Jurors say that *R* desired to enfeof his son *P*, an infant seven years old; he gave the land in the hundred court and took the child's homage; he went to the land and delivered seisin; he then committed the land to one *X* to keep to the use of *P* (*ad custodiendum ad opus ipsius Petri*) and afterwards he committed it to *Y* for the same purpose; *X* and *Y* held the land for five years to the use of *P*.

Bracton's Note Book, pl. 1244 (A. D. 1238-9): A woman, mother of *H*, desires a house belonging to *R*; *H* procures from *R* a grant of the house to *H* to the use (*ad opus*) of his mother for her life.

Assize Roll No. 1182, m. 8 (one of Bracton's Devonshire rolls): 'Iuratores dicunt quod idem Robertus aliquando tenuit hundredum illud et quod inde cepit expleta. Et quaesiti ad opus cuius, utrum ad opus proprium vel ad opus ipsius Ricardi, dicunt quod expleta inde cepit, sed nesciunt utrum ad opus suum proprium vel ad opus ipsius Ricardi quia nesciunt quid inde fecit.'

Chronicon de Melsa, ii. 116 (an account of what happened in the middle of cent. xiii. compiled from charters): Robert confirmed to us monks the tenements that we held of his fee; 'et insuper duas bovatas cum uno tofto . . . ad opus Ceciliae sororis suae et heredum suorum de corpore suo procreatorum nobis concessit; ita quod ipsa Cecilia ipsa toftum et ii. bovatas terrae per forinsecum servitium et xiv. sol. et iv. den. annuos de nobis teneret. Unde eadem toftum et ii. bovatas concessimus dictae Ceciliae in forma praescripta.'

IX. The lands and revenues of a religious house were often appropriated to various specific purposes, e. g. *ad victum monachorum*, *ad vestitum monachorum*, to the use of the sacrist, cellarer, almoner or the like, and sometimes this appropriation was designated by the donor. Thus, e. g. Winchcombe Landboc, i. 55, 'ad opus librorum'; i. 148, 'ad usum infirmorum monachorum'; i. 73, certain tithes are devoted 'in usum operationis ecclesiae,' and in 1206 this devotion of them is protected by a ban pronounced by the abbot; only in case of famine or other urgent

necessity may they be diverted from this use. So land may be given 'to God and the church of St. German of Selby to buy eucharistic wine (*ad vinum missarum emendum*)'; Selby Coucher, ii. 34.

In the ecclesiastical context just mentioned *usus* is a commoner term than *opus*. But the two words are almost convertible. On Curia Regis Roll No. 115 (18-9 Hen. III.) m. 3 is an action against a royal purveyor. He took some fish *ad opus Regis* and converted it *in usus Regis*.

X. In the great dispute which raged between the archbishops of Canterbury and the monks of the cathedral monastery one of the questions at issue was whether certain revenues, which undoubtedly belonged to 'the church' of Canterbury, had been irrevocably devoted to certain specific uses, so that the archbishop, who was abbot of the house, could not divert them to other purposes. In 1185 Pope Urban III. pronounces against the archbishop. He must restore certain parochial churches to the use of almonry. '*Ecclesiae de Estreia et de Munechetun . . . ad usus pauperum provide deputatae fuissent, et a . . . praedecessoribus nostris eisdem usibus confirmatae . . . Monemus quatenus . . . praescriptas ecclesias usibus illis restituas.*' So the prior and convent are to administer certain revenues which are set apart 'in perpetuos usus luminarium, sacrorum vestimentorum et restaurationis ipsius ecclesiae, et in usus hospitum et infirmorum.' At one stage in the quarrel certain representatives of the monks in the presence of Henry II. received from the archbishop's hand three manors '*ad opus trium obedientiariorum, cellerarii, camerarii et sacristae.*' See *Epistolae Cantuarienses*, pp. 5, 38, 95.

XI. We now come to the very important case of the Franciscans.

Thomas of Eccleston, *De adventu Fratrum Minorum* (*Monumenta Franciscana*, i.), p. 16: '*Igitur Cantuariæ contulit eis aream quandam et aedificavit capellam . . . Alexander magister Hospitalis Sacerdotum; et quia fratres nihil omnino appropriare sibi voluerunt, facta est communitati civitatis propria, fratribus vero pro civium libitu commodata . . . Londoniæ autem hospitatus est fratres dominus Johannes Ywim, qui emptam pro fratribus aream communitati civium appropriavit, fratrum autem usumfructum eiusdem pro libitu diminorum devotissime designavit . . . Ricardus le Muliner contulit aream et domum communitati villae [Oxoniae] ad opus fratrum.*' This account of what happened in or about 1225 is given by a contemporary.

*Prima Fundatio Fratrum Minorum Londoniæ* (*Monumenta Franciscana*, i.), p. 494. This document gives an account of many donations of land made to the city of London in favour of the Franciscans. The first charter that it states is one of 1225, in which John Iwyn says that for the salvation of his soul he has given a piece of land to the *communitas* of the city of London in frankalmoin '*ad inhospitandum [a word missing] pauperes fratres minorum [minores?] quamdū voluerint ibi esse.*'



XII. The attempt of the early Franciscans to live without property of any sort or kind led to subtle disputations and in the end to a world-shaking conflict. At one time the popes sought to distinguish between ownership and usufruct or use; the Franciscans might enjoy the latter but could not have the former; the *dominium* of all that was given to their use was deemed to be vested in the Roman church and any litigation about it was to be carried on by papal procurators. This doctrine was defined by Nicholas III. in 1279. In 1322 John XXII. did his best to overrule it, declaring that the distinction between use and property was fallacious and that the friars were not debarred from ownership. Charges of heresy about this matter were freely flung about by and against him, and the question whether Christ and His Apostles had owned goods became a question between Pope and Emperor, between Guelph and Ghibelline. In the earlier stages of the debate there was an instructive discussion as to the position of the third person, who was sometimes introduced as an intermediary between the charitable donor and the friars who were to take the benefit of the gift. He could not be treated as agent or procurator for the friars unless the ownership were ascribed to them. Gregory IX. was for treating him as an agent for the donor. See Lea, History of the Inquisition, iii. 5-7, 29-31, 129-154.

XIII. It is very possible that the case of the Franciscans did much towards introducing among us both the word *usus* and the desire to discover some expedient which would give the practical benefits of ownership to those who could yet say that they owned nothing. In every large town in England there were Minorites who knew all about the stormy controversy, who had heard how some of their foreign brethren had gone to the stake rather than suffer that the testament of St. Francis should be overlaid by the evasive glosses of lawyerly popes, and who were always being twitted with their impossible theories by their Dominican rivals. On the continent the battle was fought with weapons drawn from the armoury of Roman law. Among these were *usus* and *usufructus*. It seems to have been thought at one time that the case could be met by allowing the friars a *usufructus* or *usus*, these terms being employed in a sense that would not be too remote from that which they had borne in the old Roman texts. Thus it is possible that there was a momentary contact between Roman law—medieval, not classical, Roman law—and the development of the English *use*. Englishmen became familiar with an employment of the word *usus* which would make it stand for something that just is not, though it looks exceedingly like, *dominium*. But we hardly need say that the *use* of our English law is not derived from the Roman 'personal servitude'; the two have no feature in common. Nor can I believe that the Roman *fideicommissum* has anything to do with the evolution of the English *use*. In the first place, the English *use* in its earliest stage is seldom, if ever, the outcome of a last will, while the



*fideicommissum* belongs essentially to the law of testaments. In the second place, if the English *use* were a *fideicommissum* it would be called so, and we should not see it gradually emerging out of such phrases as *ad opus* and *ad usum*. What we see is a vague idea, which developing in one direction becomes what we now know as agency and developing in another direction becomes that *use* which the common law will not, but equity will, protect. Of course, again, our 'equitable ownership' when it has reached its full stature has enough in common with the praetorian *bonorum possessio* to make a comparison between the two instructive; but an attempt to derive the one from the other would be too wild for discussion.

*F. W. Maitland.*

POWER OF A STATE TO DIVERT AN  
INTERSTATE RIVER.<sup>1</sup>

IT is believed that the city authorities of Boston are considering the possibility of taking water from the Nashua River to supply the inhabitants of the city. The Nashua River rises in Massachusetts, and flows thence into New Hampshire, where it empties into the Merrimack. At Nashua, N. H., the Nashua and Jackson Manufacturing Companies have large mills, the power for which is furnished by the Nashua River; and this water-power would, it is apprehended, be seriously impaired by the proposed diversion of the river to supply Boston. It is supposed that Boston may purchase a strip of land on the banks of the Nashua River, at some point in Massachusetts, distant about thirty miles from Boston, and may then apply to the legislature of Massachusetts for an act authorizing the diversion of the river, with a provision for ascertaining and paying the damages to lower riparian proprietors in Massachusetts, and possibly with a like provision in reference to the riparian proprietors in New Hampshire.

The Nashua and Jackson Manufacturing Companies desire an opinion as to the power of the Massachusetts legislature to authorize such diversion of the river, either with or without a provision for compensation to the New Hampshire riparian proprietors.

We cannot bring ourselves to believe that such an act, in either form, will be passed by the Massachusetts legislature. But, for the purposes of this discussion we will assume that the act has been passed in Massachusetts without any concurrent legislation in New Hampshire, that the city authorities are attempting to carry it out, and that the Nashua Manufacturing Company has brought a bill in equity in the United States Circuit Court for the District of Massachusetts against the city of Boston and its agents, praying that they may be enjoined from diverting the water. What decision would be given?

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<sup>1</sup> This article, in substance, consists of an opinion given by the writers, in January, 1894, as counsel consulted in behalf of the Nashua and Jackson Manufacturing Companies. No legislation, such as is herein discussed, has yet taken place; and consequently there is no litigation pending on this subject.

This question is considered, for the present, upon two assumptions: 1, that the proposed diversion would result in substantially impairing the water power at Nashua; 2, that the Nashua River is not "navigable" in the legal sense of that term.

The city of Boston, by becoming a riparian proprietor (by purchasing land on the banks of the Nashua River at a distance of thirty miles from the city), could not thereby acquire the right to take water from the river for the supply of the citizens, — could not acquire the right to take water from the river in sufficient quantities to supply the domestic wants of its inhabitants.<sup>1</sup>

The diversion of the water by the city, if done without legislative authority, would be a tort. The New Hampshire mill-owners could proceed against the city or its agents, either in a Court of Equity for prevention, or in a Court of Law for the recovery of damages. And they could maintain such proceedings in *Massachusetts*, either in the State Court or in the United States Circuit Court for the District of Massachusetts.<sup>2</sup>

Such a taking could not be constitutionally authorized by the Massachusetts legislature, as against Massachusetts riparian owners, unless provision were made for compensation. It would be regarded as a taking of the property of the lower owners on the Massachusetts banks of the river.<sup>3</sup> It is taking an easement in

<sup>1</sup> *City of Emporia v. Soden*, 25 Kansas, 588; s. c. 37 Am. Rep. 265; *Stein v. Burden*, 24 Alabama, 130, pp. 146-147; *Lord v. Meadville Water Co.*, 135 Penn. St. 122; s. c. 19 Atl. Rep. 1007; 2 Lewis Am. R. R. & Corp. Rep. 744; and see note page 746. *ENDICOTT, J.*, in *Etna Mills v. Brookline*, 127 Mass. 69, p. 72.

<sup>2</sup> *Foot v. Edwards*, 3 Blatchford, 310; *Rundle v. Delaware, &c. Co.*, 1 Wallace, Jr. 275; *GRIER, J.*, pp. 288-290; *Rutz v. St. Louis*, 7 Fed. Rep. 438; *Manville Co. v. Worcester*, 138 Mass. 89; 6 Criminal Law Magazine, 168-173. See also *Burk v. Simonson*, 104 Indiana, 173, p. 179. (The decision in *Worster v. W. L. Co.*, 25 N. H. 525, is opposed to the great weight of authority. It is based on the erroneous supposition that the so-called rule in *Bulwer's Case* has become obsolete; whereas that rule prevails in most jurisdictions to-day.)

<sup>3</sup> *Lewis on Eminent Domain*, ss. 61 and 62; 78 Maine, pp. 132 and 134.

This doctrine was not questioned in the much-discussed case of *Watuppa Reservoir Co. v. Fall River*, 147 Mass. 548, commented upon in 2 HARV. LAW REV. 195, 316, and 3 HARV. LAW REV. 1. The decision of the majority was based on the alleged absolute power of the State, under the Colony Ordinance, over the waters of "great ponds." The point actually decided in a recent Minnesota case (*Minneapolis Mil. Co. v. Water Com'rs of St. Paul*, 58 N. W. R. 33; 8 HARV. LAW REV. 62) also related to the taking of water from a pond; but the court did not apparently rely on any special reservation of State authority over ponds, and the opinion seems to apply the principle to rivers also. The court appear to proceed upon the theory that the State is absolute owner of the bed of the Mississippi River, a doctrine not likely to be contended for in the case of the Nashua River.



the riparian proprietor's land.<sup>1</sup> The proprietor has a right that the stream shall continue to flow to his premises in its natural way. "This right is a part of his property in the land and in many cases constitutes its most valuable element."<sup>2</sup> The Massachusetts legislature can, by making provision for compensation, constitutionally authorize such taking or diversion, as against lower riparian proprietors in Massachusetts. But it does not follow that the Massachusetts legislature can thus authorize the taking as against lower riparian proprietors in New Hampshire.

Because Massachusetts can compel a sale of property in Massachusetts, it does not follow that it also can compel a sale of property in New Hampshire. Massachusetts has not the power to compel a New Hampshire riparian proprietor to sell his right (annexed to and arising out of his New Hampshire land), that the water of the river should continue to flow to his land. A State cannot exercise the power of eminent domain extra-territorially. Massachusetts cannot condemn land in New Hampshire.<sup>3</sup> Massachusetts cannot, as against a citizen of New Hampshire, authorize the doing of an act in Massachusetts which will result in the taking of property rights in New Hampshire. Massachusetts could not authorize the building of a dam in Massachusetts which would flood land in New Hampshire.<sup>4</sup>

By parity of reasoning, Massachusetts could not authorize the construction of an aqueduct or canal in Massachusetts which would divert water from a stream naturally flowing to New Hampshire. The right infringed by flooding New Hampshire land may be called absolute ownership. The right infringed by diverting water from New Hampshire land may be called an easement. The consequence in the one case may be positive, and in the other case negative. But in each case it is a property right that is infringed; and the consequence is as direct in the latter case as in the former.<sup>5</sup>

Possibly it may be argued that the New Hampshire riparian owner's right to have the stream flow from Massachusetts to his

<sup>1</sup> 45 Am. Rep. pp. 661-662.

<sup>2</sup> Lewis on Eminent Domain, s. 61. KNOWLTON, J., 147 Mass. p. 561.

<sup>3</sup> Crosby v. Hanover, 36 N. H. 404; Randolph on Eminent Domain, s. 28.

<sup>4</sup> APPLETON, J., in *Worster v. G. F. M. Co.*, 39 Maine, 246, p. 250. LADD, J., in *Salisbury Mill's v. Forsaith*, 57 N. H. 124, p. 127; I. W. SMITH, J., in *Same Case*, p. 131.

<sup>5</sup> See HOLMES, J., 138 Mass. p. 90; *Saunders v. Bluefield, &c. Co.*, 58 Fed. Rep. 133; Randolph on Eminent Domain, s. 28.

land in New Hampshire is a right of property *in Massachusetts*, and hence can be taken by the Massachusetts power of eminent domain. But this position is not tenable. The fact that the New Hampshire riparian owner may bring an action in Massachusetts does not necessitate the conclusion that his injured property is in Massachusetts. His property right in New Hampshire is injured by a tort in Massachusetts. The damage occurs in New Hampshire. The act that occasioned the damage was done in Massachusetts. Hence the law permits an election of remedies. Two things are required to give an action: 1, property in the plaintiff; 2, a violation by defendant of plaintiff's property right. If the property damaged is in one State, and the act which caused the damage is done in another State, the better view is that there may be an action in either State; in the State where the act was done, or in the State where the damage resulted. The reason is that otherwise there might often be a failure of justice from want of a remedy practically available.

The right of the New Hampshire riparian owner to have the stream flow to his land is a property right in New Hampshire. It is an easement annexed to his land in New Hampshire.<sup>1</sup> This is put with great distinctness by Judge Story, in *Slack v. Walcott*, 3 Mason, 508, p. 516. In that case, the plaintiff owned a mill in Massachusetts on a river which formed the boundary between Massachusetts and Rhode Island. The defendant diverted water from the river on the Rhode Island side. STORY, J., said of the plaintiff's right: "The right, however, is not a distinct right to the water, as *terra aquâ coöperta*, or as a distinct corporeal hereditament, but as an incident to the mill, and attached to the realty. It passes by a grant of the mill, and has no independent existence. It is not real estate situated in Rhode Island. It is an incorporeal hereditament annexed to a freehold in Massachusetts. And a conveyance of the mill, good by the laws of the State where the mill is situated, conveys all the appurtenances. The wrong done by stopping the flow of the water by any obstruction or drain in Rhode Island is an injury done to the mill itself in Massachusetts. In a just sense, the wrong may be said to be done in both States, like the analogous case of an injury to land lying in one county by an act done in another county."<sup>2</sup> So the correlative right of the

<sup>1</sup> See 45 Am. Rep. 661-662. KNOWLTON, J., 147 Mass. pp. 561, 566-567.

<sup>2</sup> For decisions as to the locality of water-power for purposes of taxation, see *Boston Mfg Co. v. Newton*, 22 Pick. 22, *Pingree v. County Comr's*, 102 Mass. 76; *Boston Water*

Massachusetts riparian owner that the river shall not be obstructed in New Hampshire so as to flow back and flood his Massachusetts land is a property right in Massachusetts, although this Massachusetts right may be violated by an act done in New Hampshire.

If then the right of Massachusetts to do this injury to the New Hampshire riparian owner cannot be justified under the Massachusetts power of eminent domain, it must be justified, if at all, under Massachusetts' general power of sovereignty. And it follows that, if Massachusetts has the power at all, it has the power untrammelled by any necessity of making compensation to the New Hampshire proprietors. For it is only when there is a taking under eminent domain that the necessity for compensation exist.

The question then is, has Massachusetts the power to do this uncompensated injury to the New Hampshire proprietors — not the power to compel them to sell their rights at a valuation to be fixed by third parties — but a power to utterly destroy their rights without giving any equivalent whatever?

The claim of the city will probably be : —

1. That Massachusetts, as a sovereign State, has the right to do the acts in question.

2. That even if such acts of the State are not justifiable by the rules of so-called international law, still neither the State nor its agents can be called to account in a court of justice for the doing of the acts ; or, in other words, that there is no enforceable remedy in a court of justice either against the State or its agents.

In support of the first position, the city will probably cite a *dictum* in *Mannville Co., v. Worcester*,<sup>1</sup> and the decision of the Supreme Court of Massachusetts in *Brickett v. Haverhill Aqueduct Co.*<sup>2</sup> And it will probably be contended that the latter case is an authority directly in point to sustain the supposed pretension of Massachusetts ; and that the *ratio decidendi* is to be found in the *dictum* in the earlier case, which, it will be said, is to the effect that Massachusetts can (lawfully) “ authorize any acts to be done within its limits, however injurious to lands or persons outside them.”

In support of the second position, the argument for defendant will probably be in substance as follows : Massachusetts is a sov-

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*Power Co. v. Boston*, 9 Met. 199, 204; *Cocheco Mfg Co., v. Strafford*, 51 N. H. 455, 461-463, 466, 467, 469; *State of Minnesota v. Minneapolis Mill Co.*, 26 Minnesota, 229.

<sup>1</sup> 138 Mass. 89, p. 90.

<sup>2</sup> 142 Mass. 394.



ereign State. If a sovereign State does, or authorizes, an act injurious to the person or the property of some individual who is not a citizen of that State, the transaction is not the subject of investigation or redress in the courts of that State or of any other State. In a suit against the individual doing the act, it is a good plea that it was an Act of State, done by him under the authority of his own government. The diversion, by Massachusetts authority, of the Nashua River does not constitute an injury redressible by the courts, inasmuch as it falls within the class of transactions known as Acts of State. Such acts of a sovereign State "can be called in question only by war, or by an appeal to the justice of the State itself." Such transactions are not governed by the laws which municipal courts administer. They will not be examined into by the courts of the State which authorized the acts. Nor can they effectually be inquired into by the courts of any other State. The latter courts have not the means of deciding what is right; *i. e.*, "they have no *authoritative* legal standard or measure for such cases;" nor have they in general "the power of enforcing" by legal process "any decision which they may make." The term "international law" is a misnomer. Law is here used only in the sense in which we speak of the "laws of society" or the "code of honor." There are no "sanctions," no commands propounded by a political superior to a political inferior, and enforced by legal penalties to be incurred in case of disobedience. Even if, by the *consensus* of mankind, a wrong has been done, "it is a wrong for which no municipal court can afford a remedy." The alleged private right of action is treated as "merged in the international question which arises between" the State doing the act and the other State of which the injured person is a subject.<sup>1</sup>

We deny both the claims supposed to be advanced in behalf of Massachusetts. We take issue, both as to the right of Massachusetts to do the act, and also as to the absence of legal remedy on the part of citizens of New Hampshire.

Massachusetts, even if an entirely distinct and independent sovereignty, — even if standing to New Hampshire in the relation of France to Spain, — would not have a right, under the rules of international law, to do this act. The law of nations recognizes no such right, even between States wholly foreign to each other.

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<sup>1</sup> 2 Stephen's History of Criminal Law of England, 61-65; Pollock on Torts 2d Eng. ed. 98-100; Clerk & Lindsell on Torts, 27, 28; Holmes's note, 1 Kent Com. 1, quoting Austin.

The United States government treats the diversion or obstruction of the ordinary flow of water, when caused by foreign nations, as a national grievance, affording ground for national complaint.

In 1880, Secretary Evarts wrote to the United States minister at the Mexican capital, and also to the Mexican minister at Washington, complaining that the Mexicans on the western shore of the Rio Grande are in the habit of diverting, into ditches dug for that purpose, all the water that comes down the river in the dry season, thereby preventing our citizens on the Texan shore from getting sufficient water to irrigate their crops. He said that this practice is "in direct opposition to the recognized rights of riparian owners," and that it "might eventually, if not amicably adjusted through the medium of diplomatic intervention, be productive of constant strife and breaches of the peace between the inhabitants of either shore." In 1884, Secretary Frelinghuysen wrote to the United States minister at the British Court, that the erection of works on the Meduxnikik River in New Brunswick, in such a way as to obstruct the flow of water in Maine, and to injure the lumbering business in that State, is a proper subject for diplomatic interposition by this government.<sup>1</sup>

Where a river flows successively through two sovereign States, there has been much dispute as to the right of one of the States to exclude the people of the other State from navigating that part of the river which flows through the territory of the former State. Thus if Massachusetts and New Hampshire were each independent nations, and the Nashua River were a navigable stream, it would be a question whether Massachusetts could deny to the people of New Hampshire the right to navigate the waters of the Nashua River while and so long as those waters flow between Massachusetts banks. Our national government has objected strenuously against the right to exclude. Thus it denied the right of Spain to exclude our citizens from the navigation of the lower part of the Mississippi River before the Louisiana cession of 1803; and has also questioned the right of Great Britain to exclude the United States from the St. Lawrence. One high authority on international law sustains the position of our government. The weight of modern authority seems against it; though it should be noted that one of the leading English writers upon international law, while inclining to the view that the exclusion may be grounded

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<sup>1</sup> 1 Wharton's International Law Digest, § 20.



"upon strict law," says that it is a harsh exercise of "an extreme and hard law;" and he expresses a hope "that this *summum jus*, which in this case approaches to *summa injuria*, may be voluntarily abandoned by his country." <sup>1</sup>

With the settlement of this mooted point we are not now directly concerned. But if the right to exclude in such a case has been seriously questioned, and has been made the subject of prolonged diplomatic controversy, what will be the fate of the far more radical claim set up in the present case? Can it find support from the doctrines of international law? The present contention goes far beyond a denial of New Hampshire's right to navigate, *in Massachusetts*, a river flowing through both States. Massachusetts, instead of merely denying New Hampshire's right to use, *in Massachusetts*, that part of the river which naturally flows through Massachusetts, is, in effect, denying New Hampshire's right to use, *in New Hampshire*, that part of the river which naturally flows through New Hampshire. Massachusetts, instead of saying to New Hampshire, "You shall not hereafter use, in Massachusetts, that part of the common river which flows through Massachusetts," makes a far more startling declaration. Massachusetts says to New Hampshire, "You shall not hereafter have the use of the river, even within your own borders, for Massachusetts denies your right to have any part of the river flow through New Hampshire." Can it be doubted that, as between two nations wholly foreign to each other, such a claim, if persisted in, would be cause for war?

Even if, then, Massachusetts occupied the position of an independent nation, she would have no right to authorize the doing of this act; although, in the event of her wrongdoing, their might be a difficulty in finding an effective remedy in a court of justice. But Massachusetts does not stand to New Hampshire in the relation of one independent nation to another. On the contrary, Massachusetts is a part of the same nation with New Hampshire. They are sister States; each being protected against the aggressions of the other by the Federal Constitution; and the citizens of each having a remedy in the Federal Courts against the citizens of the other who commit injuries under the attempted, but invalid, sanction of their State.

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<sup>1</sup> See Pomeroy, International Law, §§ 131-138 (quoting 1 Phillimore, Int. Law, 185). Compare 1 Kent's Com. 35, 36.



If this act would be cause for national complaint, or for war, if done by one foreign nation to another, then the doing of it by one State of this Union to the injury of the people or land of a sister State, is a violation of the Constitution of the United States. The Federal Constitution impliedly prohibits such aggressions by one State or its citizens upon another State or its citizens as would afford just cause for governmental complaint if the two States were each independent nations, — such aggressions as would between distinct sovereignties constitute an international grievance, and, if persisted in, afford cause for war. The different States, by assenting to the Constitution, and becoming members of the Federal Union, impliedly agree not to do any acts to the injury of each other, or to the injury of the people of each other, which would violate the rules of international law. The States give up the right to vindicate their respective claims by war, or to settle them, without the consent of Congress, by interstate treaties. As a substitute for the rights of the States to resort to war, a system of common judicial tribunals is established to adjudicate their controversies, and the controversies between their respective citizens. In construing the Constitution, we may reason "from its spirit, and from the general character of the nationality implied all through its separate parts, — as in its avowed purpose to form a more perfect union and insure domestic tranquillity, in its prohibition of [ war and ] subordinate alliances among the States, in its reference of every controversy between them to the judicial branch of the united government." In 108 U. S. p. 90, WAITE, C. J., said : "All the rights of the States as independent nations were surrendered to the United States. The States are not nations, either as between themselves or towards foreign nations. They are sovereign within their spheres, but their sovereignty stops short of nationality. Their political status at home and abroad is that of States in the United States. They can neither make war nor peace without the consent of the national government. Neither can they, except with like consent, enter into any agreement or compact with another State. Art. I., Sec. 10, cl. 3." <sup>1</sup>

The statutes of the States are not the supreme law of the land within their respective limits. The Constitution of the United States is the supreme law of the land. "The mandate of the State affords no justification for the invasion of rights secured by the

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<sup>1</sup> See also 1 Hare, Const'l Law, pp. 15, 16, p. 52 ; Pomeroy, Const'l Law, 9th ed., s. 43.

Constitution of the United States." MATTHEWS, J. 114 U. S. p. 292. By adopting the United States Constitution and joining the Union the State has parted with its "sovereign right of judging in every case on the justice of its own pretensions."<sup>1</sup> The question of the validity of State action thenceforth "ceases to be a political one, to be decided by the *sic volo, sic jubeo*, of political power; it comes to the court to be decided by its judgment;" the court being "bound to act by known and settled principles of national or municipal jurisprudence, as the case requires."<sup>2</sup> To "insure domestic tranquillity" is one of the objects expressly enumerated in the preamble to the United States Constitution. The otherwise imminent danger of war between the States is one of the prominent reasons urged by Hamilton in the Federalist for adopting the Constitution.<sup>3</sup> And great stress was laid by the same writer on the necessity of conferring jurisdiction upon the Federal judiciary to settle disputes between States, and also disputes between citizens of different States. "If such disputes could not be brought before the Courts of the Union there would be no effectual means of settlement, and the difficulty might result in interstate war."<sup>4</sup> "Whatever practices may have a tendency to disturb the harmony of the States, are proper objects of Federal superintendence and control."<sup>5</sup>

"The act," it will be said, "which gives rise to the injury is an act done *in Massachusetts*." True; but its operation, its inevitable operation, is not confined to the limits of that State. If the plea that the act was done in Massachusetts is allowed as a perfect defence, it can also be used to justify damming in Massachusetts (close to the State line) a river flowing from New Hampshire to Massachusetts, and thus flooding New Hampshire territory by back water. In this way, by damming the Merrimack, Massachusetts might destroy the border city of Nashua, perhaps not more certainly, but more speedily, than by the present attempt to divert the source of its water power. So, if this plea be valid, Massachusetts can undermine the entire strip of Massachusetts land adjoining the New Hampshire boundary, and can explode the mine without any liability on the part of its agents for the inevitable result of upheaving the soil and demolishing the buildings on the New Hampshire side of the line. In the well-known case of City

<sup>1</sup> See 6 Wheaton, p. 380.

<sup>2</sup> 2 Hare, Const'l Law, p. 1024.

<sup>3</sup> Compare BALDWIN, J., 12 Peters, p. 737. <sup>5</sup> Federalist, Number 80.

<sup>4</sup> Federalist, Numbers 6 and 7.



of *New York v. Miln*,<sup>1</sup> there was a difference of opinion among the judges as to whether the statute there in question was within the power possessed by the State to enact municipal legislation, — the power to legislate on matters of internal police. But both the majority and the minority agreed that the States have no authority to pass laws which act upon subjects beyond their territorial limits; and that a valid State statute must be one "whose operation was within the territorial limits of the State." (Compare BARBOUR, J., 11 Peters, p. 139; and STORY, J., 11 Peters, p. 156.)

The question has thus far been discussed as if the different States had each possessed full power of sovereignty from the date of their first settlement up to the adoption of the present Federal Constitution. But it is matter of common knowledge that this assumption is without foundation. Prior to the Revolution the colonies were not thirteen separate and independent nations. Each "was a dependency and a part of the British Empire." "The Declaration of Independence was not the work of thirteen separate colonies, each acting in an assumed sovereign capacity, but of the United Colonies acting in a national capacity through their delegates in Congress assembled." As soon after the Declaration as there was time to ascertain and formulate the popular wish, in 1777, Articles of Confederation were adopted by Congress, and were ratified the following year by most of the colonies (including Massachusetts and New Hampshire).<sup>2</sup>

Not only is it true that Massachusetts and New Hampshire were not formerly independent nations, but it is also true that they were both subjects of the same power. Their domains did not originally belong to different sovereignties, and were not originally granted by different European Powers; as, for example, Florida under the rule of Spain, and Georgia, subject to the dominion of Great Britain. Did the King of Great Britain, in chartering these respective colonies of Massachusetts and New Hampshire, intend to give each the right to destroy the other? At that time the rivers and the water-power were the important features of the country. Must not the King's grants of these two colonies be taken as each subject to the implied reservation or condition that neither province should materially change the course of streams flowing from one to the other? If such a condition can plausibly be contended

<sup>1</sup> 11 Peters, 102.

<sup>2</sup> See Pomeroy, *Const'l Law*, ss. 47, 52, 53, 59. Compare BALDWIN, J., 12 Peters, p. 748.



for in case of an artificial watercourse (an apparent, continuous, and reasonably necessary easement) extending across adjacent lots held by different parties under titles derived from a common grantor, can it fail to apply to grants by one and the same sovereign of adjacent provinces crossed by natural streams? Was the Confederation of 1777-78, or the Constitution of 1787, intended to enlarge the powers of the respective colonies to harass and annoy, not to say destroy, each other? Was the United States Constitution adopted with the view of conferring on each State power to inflict injuries upon sister States,—injuries of a nature which none of them had hitherto possessed the right to inflict, and which would not be justifiable under the rules regulating the intercourse of civilized nations?

In this connection it should be carefully noted that the rights claimed for the New Hampshire riparian owners are *jure natura*, the river being a natural stream, and the law being a recognition of the course of nature in every part of the stream. No artificial servitude has been forced upon Massachusetts territory along the banks of the Nashua River by the Nashua Companies, restricting the natural enjoyment of the use of the water which they once had, but the Nashua Companies have simply enjoyed that which was left after riparian owners in Massachusetts enjoyed their natural privileges.<sup>1</sup> Rights like these are not created by toleration or the unreasonable deprivation of the Massachusetts riparian owners. The conduct of these sister States towards each other and the common law which prevailed while they were colonies, sanctioned the confidence that such property rights had locality, and that under that view they would be as permanent and inviolable as the mills to which they were by natural law attached. That confidence was based upon the history of similar water rights in the lands from which the colonists came, as elsewhere, and became the foundation of great investments, and gave rise to the growth of large cities.

What results would follow if the opposite view is adopted? Let us look at the consequences of conceding to each State the full power of sovereignty supposed to be now claimed for Massachusetts. Consider, first, the consequences in respect to dealings with

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<sup>1</sup> Gould on Waters (2d ed.) pp. 300, 301, 302; *Yates v. Milwaukee*, 10 Wall. 497; *Lyon v. Fishmonger's Company*, L. R. 1 App. Cas. 662; *Diedrich v. N. W. Ry. Co.*, 42 Wis. 248; *Stevens Pt. Boom Co. v. Reilley*, 44 Wis. 295, 305; *Morrill v. St. Anthony Falls Co.*, 26 Minn. 222.

foreign nations ; second, the consequences with respect to dealings with sister States.

If each State possesses this full sovereignty, it may at any time do acts which will surely embroil itself in war with foreign nations, a war which may result disastrously and may involve other States in international difficulties. Both the border States and the seaboard States would be peculiarly liable to such troubles ; and the Constitution was framed with the express view of preventing such occurrences. The inadmissibility of this claim of sovereign power on the part of a State is clearly pointed out by Judge Story. "The States, as such, are not known in our intercourse with foreign nations, and not recognized as common sovereigns on the ocean. And if they were permitted to exercise criminal or civil jurisdiction thereon, there would be endless embarrassments arising from the conflict of their laws, and the most serious dangers of perpetual controversies with foreign nations. In short, the peace of the Union would be constantly put at hazard by acts over which it had no control, and by assertions of right which it might wholly disclaim."<sup>1</sup>

Equally alarming consequences will result from the doctrine that a State may, with impunity, authorize aggressions upon the property of the citizens of a sister State. If it be established that the agents of the authorizing State cannot be called to account in the Federal Courts for their acts, then, in all cases of serious injury, one of three results must follow, either (1) the assailed State must submit to gross injustice ; or (2) laws will be passed of a retaliatory nature ; such as were actually passed by three States "during the steamboat controversy," and which "threatened the safety and security of the Union ;"<sup>2</sup> or (3) the injured State must resort to the right of revolution, secede from the Union, and go to war with the aggressive State.

If the aggrieved State had never become a member of the Union, the right of making war would have been left to her as a last resort. But when New Hampshire entered the Union, she expressly gave up the right of making war, or conclude a treaty of peace. Her hands are tied. "Bound hand and foot by the prohibitions of the Constitution, a complaining State can neither treat, agree, or fight with its adversary without the consent of Congress."<sup>3</sup> Does she

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<sup>1</sup> Story on the Constitution, s. 1673.

<sup>3</sup> Sec. 12 Peters, p. 726.

<sup>2</sup> Story, J., 11 Peters, 159-160.

give up all these rights under the Constitution and receive nothing in return? A resort to the judicial tribunals of the Union must certainly be left to her and to her citizens. She may litigate disputes with the aggressive State; and her citizens may have remedies against the citizens of the other State who have committed torts under the unfounded assumption that they had valid State authority for their doings. The Federal tribunals must say that, inasmuch as, under the Constitution, the States cannot make war upon each other, they cannot constitutionally do to each other such acts as would be occasion for war between independent nations.

Thus far we have not relied upon the Fourteenth Amendment to the United States Constitution. We have maintained, and we believe, that the Constitution as it stood before the passage of that amendment prohibits State legislation of this description. But if this position is held erroneous, it would certainly seem that the Fourteenth Amendment must be construed as prohibitive of such legislation. That amendment is in part as follows: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." This amendment was intended to afford national protection to property rights in all States, as against aggression attempted under State statutes. There is no sufficient reason for considering it as intended to protect property rights in any particular State only as against the aggression of that State, and not as against the aggression of any other State. There is no ground for limiting the words "any person" in the clause prohibiting deprivation of property to persons within the territorial jurisdiction of the State (as in the following clause which says "any person within its jurisdiction"). It is settled that the requirement of "due process of law" is not satisfied by the formal enactment of a statute; it must be a valid statute, one which the legislature had power to enact. The legislature of one State has not power to compel a citizen of another State to part with his property rights in that other State for a price to be fixed by third persons. Hence a statute providing for such compulsory extra-territorial purchase is not "due process of law."

If the foregoing views are correct, it follows that New Hampshire riparian proprietors have effective remedies in the United States Circuit Court for the District of Massachusetts; remedies either



preventive or compensatory. They may enjoin individuals or corporations from attempting to carry out the Massachusetts statute, or they may recover damages after the wrong has been done.

Nor does the Eleventh Amendment to the United States Constitution stand in the way. That amendment prohibits suits in the United States Courts *against a State* by citizens of another State. But it does not prohibit suit against the individuals who undertake to act as agents or officers of a State, in a case like the present. This is conclusively settled by the decisions of the Supreme Court of the United States.

The Eleventh Amendment does not apply to the "class of cases where an individual is sued in tort for some act injurious to another in regard to persons or property, to which his defence is that he has acted under the orders of the 'State' government. In these cases he is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he *asserts* authority as such officer. To make out his defence he must show that his authority was sufficient in law to protect him."—MILLER, J.<sup>1</sup> To complete his defence he must produce a *valid* statute of the State, authorizing what he is doing. The Court rejects "the extravagant proposition that a void act can afford protection to the person who executes it."—MARSHALL, C. J.<sup>2</sup> Suits may be maintained "against individual defendants, who, under color of the authority of unconstitutional legislation by the State, are guilty of personal trespasses and wrongs. If the State legislation under which the defendant attempts to justify is held null and void, he is left defenceless; and legal proceedings may be taken against him "in those instances where the act complained of, considered apart from the official authority (ineffectually) alleged as its justification, and as the personal act of the individual defendant, constituted a violation of right for which the plaintiff was entitled to a remedy at law or in equity against the wrongdoer in his individual character."—MATTHEWS, J.<sup>3</sup> One of the early and leading cases on this subject has since been summarized as follows: "The right asserted and the relief asked were against the defendants as individuals. They sought to protect themselves against personal liability by their official character as representatives of the State. This they were not permitted to do, because

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<sup>1</sup> 109 U. S. p. 452.

<sup>2</sup> 9 Wheaton, p. 839.

<sup>3</sup> 123 U. S. pp. 500, 501, 502.

the authority under which they professed to act was void,"<sup>1</sup> If a suit at law may be maintained against the agent to recover damages for his acts done in execution of a void statute of the State, it follows that a court of equity on a proper case will restrain him by injunction from attempting to commit the wrong. "It being admitted, then," said MARSHALL, C. J.<sup>2</sup> "that the agent is not privileged by his connection with his principal, that he is responsible for his own act, to the full extent of the injury, why should not the preventive power of the court also be applied to him? Why may it not restrain him from the commission of a wrong which it would punish him for committing?" That the remedy by injunction may be applied in such cases does not now seem open to doubt.<sup>3</sup>

For the sake of argument we have assumed that the city of Boston, or its board of water commissioners, are to be regarded as occupying the position of officers or agents of the State, acting under the peremptory command of the State. But it may well be questioned whether a municipality, acting by permission of the State to bring about a benefit peculiar to itself, stands like an officer obeying a peremptory governmental order.

The above positions as to the non-applicability of the Eleventh Amendment are so thoroughly sustained by the decisions of the Supreme Court of the United States, that it can hardly be necessary to inquire whether, if a contrary view were taken of that amendment, it might not be found that there was another method of bringing this dispute before a Federal court. Suppose it to be held that suit by the Nashua Company against the agent of Massachusetts is prohibited by the Eleventh Amendment, on the ground that the suit is really against the State, and that the dispute is a matter of State concern. Now, if this is a matter of State concern for Massachusetts, why not also to New Hampshire? And if so, why may not New Hampshire avail herself of the clause in the United States Constitution extending the judicial power of the United States "to controversies between two or more States." One State may maintain a bill in equity against another to determine a question of disputed boundary.<sup>4</sup> Has the United States

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<sup>1</sup> 123 U. S. p. 500, MATTHEWS, J. (in reference to *Osborn v. Bank of U. S.* 9 Wheaton, 738). See also 2 Hare, *Constitutional Law*, 1058.

<sup>2</sup> In 9 Wheaton, p. 843.

<sup>3</sup> See SWAYNE, J., 16 Wallace, pp. 220, 232; MATTHEWS, J., 114 U. S. 295.

<sup>4</sup> *Rhode Island v. Massachusetts*, 12 Peters, 657.

Court jurisdiction of the question of interstate boundary, and no jurisdiction of the question whether the territory within the boundary shall, by the act of a neighboring State, be deprived of all which makes that territory valuable? Has New Hampshire no interest in the proposed change of one of her leading topographical features? Would Massachusetts, as a State, have no remedy in case New Hampshire should attempt to authorize the diversion of the Connecticut or the Merrimack?

We have not been fortunate enough to find much authority bearing directly on this case. The weight of judicial opinion, as thus far expressed, seems decidedly in favor of the foregoing views. Indeed, it can hardly be said that there has been any considered opinion to the contrary. We will, however, comment upon two cases<sup>1</sup> which may possibly be claimed as tending in the other direction.

We have assumed that *Brickett v. Haverhill Aqueduct Co.*<sup>2</sup> will be cited as an authority directly in points against our views. But a careful examination of that case shows that the great point here in question was not raised by the plaintiff in that case; and that the case, if unfavorable to our view, is so rather from the inference to be drawn from the omission of counsel to raise the point, or of the court to allude to it, than from any authoritative decision or thorough investigation as to this subject.

A Massachusetts statute authorized the aqueduct company to take water, to a certain extent, from two ponds and a lake in Massachusetts, with a provision for the payment of damages. The company at times took more water than the statute allowed, drawing down the pond below low-water mark, in violation of the express prohibition of the statute. The outlet of the lake was a small natural stream. The plaintiff owned land, situated partly in Massachusetts and partly in New Hampshire, through which this stream flowed. The plaintiff, whose citizenship is not directly stated, contended that the taking of water by the aqueduct company had diminished the flow of water through his land, and brought, in the Superior Court of Massachusetts, a common-law action of tort for this diversion of the water of the stream. The plaintiff did not raise the question whether the Massachusetts statute could have a valid extra-territorial operation. His only objection to the validity of the statute was, that it did not con-

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<sup>1</sup> 142 Mass. 394, and 30 Fed. Rep. 392.

<sup>2</sup> 142 Mass. 394.



tain such an adequate provision for the recovery of damages as is required by the Massachusetts Constitution. This was the only constitutional question to which the attention of the court was directed.

MORTON, C. J. said that where the legislature authorizes a taking of property, and provides in the statute a mode of ascertaining and recovering the damages, "such statutory remedy is the only remedy to which the injured party can resort for acts done within the authority of the statute." He then says, p. 396 (the italics are ours):—

"It follows that the plaintiff cannot maintain an action of tort for injuries caused to him by any acts of the defendant which it was authorized to do under the statute, but his only remedy is the one pointed out by the statute."

*"The plaintiff recognizes this principle; but contends that the statute of 1867 is unconstitutional and invalid, because it does not make adequate provision for the recovery of damages caused by the defendant's acts under it."*

The opinion then considers the adequacy of the statutory provision for compensation, and holds it to be in compliance with the Massachusetts Constitution. MORTON, C. J. then adds, p. 398:—

"We do not deem it important that the land of the plaintiff which was injured was outside of the limits of this State. The language of the act is general, and puts all water rights upon the same footing, and applies to a proprietor outside the State. Such proprietor certainly has no greater rights than the citizens whose lands or water rights within the State are injured by the acts of the defendant under the authority of the Legislature. Whether the constitutional objection we have considered would be open to a citizen of another State, whose lands or water rights in that State are injured, we need not discuss nor decide.

"It follows that the plaintiff cannot maintain this action for damages caused by any acts of the defendant which are authorized by the statute."

(The remainder of the opinion is to the effect that the defendant is liable in this action for acts done in excess of its statutory powers, and that the plaintiff may recover for such damages and such only as were caused by this excess.)

The language of the court — "We do not deem it important that the land of the plaintiff which was injured was outside of the limits of the State"—must be construed with reference to the special

topic then under discussion. The plaintiff, be it remembered, was not disputing the power of the Massachusetts Legislature to pass the statute, if only it contained a sufficient provision for compensation. The sole question presented to the court by the plaintiff was that in relation to the constitutional adequacy of this part of the statute. The Court *decided* only that the location of the land was not important as bearing on the question whether this statutory provision for compensation was an adequate compliance with the requirements of the Constitution of Massachusetts; *i. e.*, that a landowner in New Hampshire cannot claim to have the Constitution of Massachusetts construed more favorably in regard to him than it would be in regard to a landowner in Massachusetts.

Banigan *v.* City of Worcester,<sup>1</sup> was decided by CARPENTER, J. in the United States Circuit Court for the District of Massachusetts, in 1887. The city, under a Massachusetts statute containing provision for compensation, had diverted, from a brook in Massachusetts, water which would naturally have flowed through the plaintiff's land in Rhode Island. The plaintiff did not question the power of the Massachusetts Legislature to authorize this diversion. On the contrary, he claimed the benefit of the statutory remedy, and filed a petition in the Superior Court of Massachusetts, praying for an assessment of his damages. Plaintiff subsequently removed the case to the United States Circuit Court. The city moved to remand the case to the State court, and also filed a demurrer to the petition. The question principally considered was the right to remove the case to the United States court. In an opinion of nearly two pages, a space of only fourteen lines is given to the point raised by the demurrer. It is not to be wondered at that the court was inclined to make short work of the demurrer. The objection to the petition came with a bad grace from the defendants. A decision in their favor involved one of two positions: either, (1) that their acts were not authorized by a statute, and that they were tort-feasors, liable in a common-law action of tort; or, (2) that Massachusetts had conferred upon them power to do the injury to the plaintiff without making any compensation, and without being liable in any way. It is obvious that the demurrer of the defendants to the plaintiff's petition would not be likely to call the attention of the court to the validity of the statute so fully as if the question had been raised by the plaintiff's bringing a common-

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<sup>1</sup> 30 Fed. Rep. 392.

law action of tort against the defendants. Whether the plaintiff may elect to avail himself of the statutory remedy is one thing. Whether the plaintiff can be restricted to that remedy is another thing.

The entire opinion of Judge Carpenter on this part of the case is as follows : —

“On the demurrer the defendant alleges that the petitions show no case for relief under the statute. The argument is, that since the lands of the petitioners are in Rhode Island, and their rights in the waters of Tatnuck Brook are appurtenant to those lands, the petitioners cannot claim a remedy under this statute unless it be held to have extra-territorial effect, which, of course, is inadmissible. I cannot agree with this argument. It has been held by the Supreme Court of Massachusetts that the owner of land in an adjoining State may have, as appurtenant to such land, an interest in land or water in Massachusetts, which may be protected by suit in the courts of that State.<sup>1</sup> I am strongly inclined to the opinion that the decision in that case is of binding force on this court in the case at bar; and, even if it be not so, I am inclined to follow that case as being of high authority, and well supported by the reasoning of the opinion.”

With so much of this opinion as holds that the statute cannot have “extra-territorial effect,” we can find no fault. Whether the learned judge means to intimate that the right of the Rhode Island landowner to have the water flow through his land is so far a property right in *Massachusetts* that Massachusetts may take away the entire right by exercising its power of eminent domain, does not seem clear. If such is his meaning, we must differ, for reasons heretofore stated. It is safe to say that this case cannot be regarded as a decisive authority, entitled to controlling weight upon the point now under consideration.

We now call attention to some authorities which tend to sustain the view we have taken of the rights of the New Hampshire riparian proprietors.

The Holyoke Water Power Co. *v.* Connecticut River Co., decided by SHIPMAN, J. in the United States Circuit Court for the District of Connecticut, in 1884,<sup>2</sup> strongly supports our view: This was a bill in equity for an injunction. The Connecticut Legisla-

<sup>1</sup> Mannville Co. *v.* City of Worcester, 138 Mass. 89

<sup>2</sup> 52 Conn. (Supplement) 570; *Same Case* (more fully reported), 22 Blatchford, 131.



ture authorized the Connecticut River Company to raise their existing dam across the river in Connecticut, in order to improve the navigation, and also maintain the water power of the Company. "The second section of the Act related to the assessment and payment of damages which should accrue to the property of any person by reason of the exercise of the powers conferred" by the Act.<sup>1</sup> The Connecticut River Company's dam was about sixteen miles below the dam, works, and factories controlled by the Holyoke Water Power Company at Holyoke, Mass. The Connecticut River Company proposed to raise their dam in Connecticut so high that it would produce to the Holyoke Company a pecuniary injury for a period of six or seven months in the year, by the diminution of its fall, but not by an overflow of its land. The court, following a Connecticut decision (which might not be followed in some other States), said that this was "a consequential injury," not "a taking of property." The court also said (following a Connecticut decision) that there would be no right of action, and no relief for such a consequential injury to land within the borders of Connecticut; but the court held that the Legislature of Connecticut could not authorize the doing of this consequential injury to land, or to rights connected with land, in Massachusetts. An injunction was granted to prevent the raising of the dam.

After holding that no action could have been maintained for such consequential injury to land within the borders of Connecticut, SHIPMAN, J. said: <sup>2</sup>—

"In this case the injury will be caused to property beyond the limits of Connecticut, and the question arises whether the doctrine which has been asserted is applicable to this state of facts.

"This question has never, so far as I can ascertain, been decided by the courts of this country. The question has arisen whether, by virtue of the right of eminent domain, one State can take, or subject to public use, land in another State, and the decisions have naturally been against such a power.<sup>3</sup> In two cases which have recently arisen in Federal courts, and which involved the right of a State to regulate or improve the navigation of a river wholly within its limits, the judges have carefully limited their decisions

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<sup>1</sup> 22 Blatchford, p. 135.

<sup>2</sup> 52 Conn., pp. 575, 576; 22 Blatchford, pp. 144, 145.

<sup>3</sup> *Farnum v. Canal Co.*, 1 Sumner, 46; *Salisbury Mills v. Forsaith*, 57 N. Hamp. 124; *Wooster v. Great Falls Co.*, 39 Maine, 245; *United States v. Ames*, 1 Wood & Minot, 76.

to the facts in the cases.<sup>1</sup> Important suggestions which bear upon the question in this case are made by Judge Treat in *Rutz v. St. Louis*,<sup>2</sup> and by Mr. Justice McLEAN, in *Palmer v. Commissioners of Cuyahoga Co.*<sup>3</sup>

"The rule which has been referred to" (as to non-remedy of Connecticut landowners) "is based upon the principle that the improvement of the navigation of navigable rivers within a State is part of the State's governmental duties, and that the work which is done towards such improvement is done in the discharge of the governmental powers of the State, and that the land of the riparian proprietor within the State is subject to the just exercise of this power; and that when the State undertakes to exercise its governmental power, the public good is paramount to the consequential injury of land which is incidentally and necessarily affected by the improvement. The land is under the jurisdiction of the State, and the State derives the power to inflict remote and consequential injuries upon it by virtue of such jurisdiction. The owner of land abutting upon a navigable river owns it subject to the right of the State to improve the navigation of the river, because the land is within the governmental control of the State; but it seems to me that the State obtains by virtue of its governmental powers no control over or right to injure land without its jurisdiction. Jurisdiction confers the power and the right to inflict consequential injury, but when no jurisdiction exists the right ceases to exist. It is a recognized principle that the statutes of one State in regard to real estate cannot act extra-territorially. As Connecticut has no direct jurisdiction or control over real estate situate in another State, it cannot indirectly, by virtue of its attempted improvement of its own navigable waters, control or subject to injury foreign real estate. If this resolution is a bar to an action for any consequential injury to land, or to rights connected with land in Massachusetts, Connecticut is acting extra-territorially.

"Let there be a decree enjoining the defendant against any further raising of its present dam and against constructing a new dam or dams to a greater height than the height occupied by the respective portions of the present structure."

*Rutz v. City of St. Louis*, 7 Federal Reporter, 438, was an action at law in the United States Circuit Court for the Eastern District

<sup>1</sup> *Escanaba Co. v. Chicago*, 107 U. S. Rep. 678; *Huse v. Glover*, 15 Fed. Rep. 296.

<sup>2</sup> 7 Fed. Rep. 438.

<sup>3</sup> 3 McLean, 266.

of Missouri. The plaintiff owned real estate on the Illinois side of the Mississippi River. He alleged that the city had unlawfully erected, on the Missouri side of the river, a dyke, which had caused forty acres of the plaintiff's Illinois land to be washed away. Defendant demurred; and, upon the argument of the demurrer, contended that the dyke was built under the authority of a Missouri statute, and consequently was not unlawful. The court held that the question of the lawfulness of the dyke could not be thus raised by the demurrer, and that the defendant must put in an answer setting forth its claims. But, in deciding this point, TREAT, J. said, p. 440: "Missouri cannot pass a law to govern Illinois, its citizens, and their realty situate in Illinois. If, pursuant to a Missouri statute, a dyke was erected destructive of property in Illinois belonging to the citizens of the latter State, such statute cannot be pleaded against them, for the Missouri statute could not operate extra-territorially."

The opinion of Attorney-General Franklin of Pennsylvania, given in 1855, and published in 4 Am. Law Register, 385-389, maintains the same view that we have taken of this question. And this view is also supported by the *dicta* of STORY, J. 3 Mason, p. 517, and WOODRUFF, J. 39 New York, p. 179.

*George B. French.*  
*Jeremiah Smith.*



THE THEORY OF INHERITANCE.<sup>1</sup>

THE foundation of Bentham's attack on the Jurisprudence of his time was its inaptness for its own acknowledged ends. Laws and courts were admittedly established to secure rights of person and of property; and yet it was obvious that in many cases, owing to the undue importance given to forms of procedure, the merits of the contest were never passed upon and the property of the litigants became the spoil of the successful pleader. Forms and rules were of course necessary in the administration of justice; it was desirable, too, that they should be consistent. But as Bentham pointed out, the lawyers in striving for the minor virtues of consistency and formality were constantly committing the deadly sin of injustice. In working out the system of pleading they forgot that the first test was how well it secured justice; that consistency was of only secondary importance.

Many laws of to-day are open to the same sort of criticism, that they overpass the reasons for them. It is, for instance, highly desirable "to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." Art. I. Constitution U. S., sec. 8. The admitted object of granting patents is to benefit the public by encouraging inventors. That this advantage should be secured as cheaply as possible no one, I suppose, will deny. And yet, though no end attainable by granting patents would be defeated by a condition giving the government a right to purchase and cancel any patent at some fixed price, we issue them without restrictions, and present unnecessarily and unreasonably to individuals rights which should be reserved to the public.

The most striking example, however, of such unreasoning legislation is seen in the law regulating the succession to property on the death of the owner. In everyday affairs no laws are of more importance; yet they have received but little attention, and their underlying principles seem to be but imperfectly understood or acted upon. Hale and Blackstone denied that any such principles existed, and asserted that inheritance was a mere matter of legislative caprice;<sup>2</sup> Coke explained that the descent of property followed what we should call the law of gravitation. The feudal laws of

<sup>1</sup> This article is the Law Part at the last Harvard Commencement, and is reprinted substantially as spoken. No effort was made to collect the authorities on the subject.

<sup>2</sup> Hale, *Hist. Com. Law*, 301 n., 320; *Bl. Com. Bk. 2*, ch. 1; *Coke Ins. L. 3*, ch. 6, § 385; *Co. Litt.* 18 b.; *Mass. Gen. Sts.* 1873, ch. 91, § 1.

descent entirely ignored any national right to inherit ; and in Massachusetts, till within twenty years, the father of a person dying without lineal issue took to the entire exclusion of the mother.

The actual transmission of estate by will certainly rest on nothing deeper than statutory law.<sup>1</sup> "The power to dispose of property by will is neither a natural nor a constitutional right, but depends wholly on statute," says Chief Justice Gray of Massachusetts (100 Mass. 235). And it seems that the same is true of descent. For the heir has no claim which the ancestor cannot disregard ; he takes only as the statutes provide ; these statutes vary greatly in different States, and have often been changed and heirs disinherited, without any constitutional question being raised ; and generally the whole estate is, if not more than a certain amount, confiscated and given to the widow.

"The legislature may to-morrow, if it pleases," says the Supreme Court of Virginia, "absolutely repeal the Statute of Wills, and that of Descents and Distributions, and declare that upon the death of a party his property shall be applied to the payment of his debts, and the residue appropriated to public uses." *Eyre v. Jacobs*, 14 Grat. 328.

In this country it is usually provided that the owner of property may, by a will executed with certain required formalities, direct to whom all his property shall go on his decease. This extraordinary power which, as Sir Henry Maine says, "implies the greatest latitude ever given in the history of the world to the volition or caprice of the individual," is subject to but one restriction ; a husband cannot by will deprive his wife of that share of his property to which the law thinks her justly entitled. Nor can a wife deprive her husband of his share in her estate. In all other particulars, with some unimportant limitations, the power of the testator is absolute. A child may be brought up in luxury and turned out on the world without a penny ; the entire fortune may be left to trustees and kept intact for nearly one hundred years ; it may be tied up in charities, with direction how every cent shall be spent to the end of time ; finally, it may be so left that it shall be free from seizure by the creditors of the devisee, and even that provision will be respected. So that we see the strange spectacle of men enjoying large income while their butchers and grocers go unpaid. If the owner does not make a will, our statutes then provide that his whole estate shall be divided equally among his nearest relatives, no matter how remote they may be.

Now, though wills and descents be creatures of positive law, it

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<sup>1</sup> 104 N. Y. 306 ; Montesquieu, *Esprit des Loix*, liv. 27, § 1.

by no means follows that there are not underlying principles of law and policy to which they should conform. And I wish, in the few moments at my disposal, to direct your attention to what these principles are, and how far they are recognized by existing laws. I shall then consider briefly a class of legislation which is at present attracting much attention, the so-called Collateral Inheritance Taxes.

What should be the purpose of laws regulating the succession to property on the death of the owner? Fortunately this question, which would involve going into the fundamentals of Economics, has been answered many times, and by men of widely different views, with substantial unanimity. Mill,<sup>1</sup> Bentham,<sup>2</sup> and even Professor Ely,<sup>3</sup> who are in general as far apart as any three men that could be named, all agree on certain general principles to which the law should conform in distributing the estates of deceased persons. It seems fair to assume their conclusion to be correct; it never, to my knowledge has been questioned.

The law, they tell us, should aim, first, to consider the wishes of the former owner; second, to secure adequate provision to his family and those dependent on him; third, to promote the equalization of fortunes, it being manifestly out of keeping with democratic ideas for the State to foster the concentration of wealth. These propositions are by no means of equal importance. Mill and Bentham, for instance, almost ignore the first, and Professor Ely regards it of much less weight than either of the others.

A scientific law of succession, therefore, while not blind to what the owner's wishes would have been, will regard them with much less consideration than it will be the rights either of his family or of the rest of the community. How far do our present laws conform to these ideas? By what method of reasoning do we reach the astonishing result that if a man die intestate, leaving an only son, the latter will take the entire estate, whether it be one hundred dollars or one hundred millions; while on the other hand, the father may at his pleasure leave his whole property to a charity, and throw the son on the world a pauper?

Our laws of succession are in their origin feudal, and to answer these questions we must glance shortly at the feudal system from which they started. Now the feudal idea was in brief this: At the head of everything the king; numerous noblemen holding large tracts of land under the king, whom they repaid by service

<sup>1</sup> Principles of Pol. Econ. Bk. 2, ch. 2, § 3.

<sup>2</sup> Principles of the Civil Code, part 2, ch. 3.

<sup>3</sup> 153 No. Am. Rev. 54



in war and otherwise; villeins, who held and worked the land of the nobleman. Everything turned on the land. The fundamental idea was that there should always be some one ready to perform the various services which the land was supposed to owe. This governing principle was especially evident in the laws of succession after death.<sup>1</sup> The land went to the eldest son, not because as a *child* he had any right to it, for the youngest son and the daughters were as near relatives, but because he was presumably better qualified to perform the services, and it was therefore for the lord's interest to have him succeed. A father could not inherit from his son; females took nothing while there were living males of the same degree of relationship; and the second son nothing so long as his elder brother was alive. About 1540, a statute made all lands devisable by will. The object of the statute, however, was not to enable the owner to distribute his land, but to give him power to disinherit an incompetent eldest son and leave all the property to the one best fitted to keep up the family prestige.<sup>2</sup> At this point the English law remained practically stationary till 1825.

Such were the laws of England when our forefathers came to this country. They were designed to protect an hereditary aristocracy, and many of their provisions were so evidently out of keeping with democratic ideas that the colonists never adopted them in full,—primogeniture, for instance, and distinctions of sex,—though for many years the eldest son took a double portion.<sup>3</sup> Our present law is the result of many modifications of the English, but its underlying principles, so far as it can be said to have any, are still those of feudal England. In no other way can we explain laws which allow any relative, however remote, to take the whole estate, and yet leave to the owner the option of excluding his own child, for no better reason than because it is his whim to do so. It seems to me high time that the absurdity and injustice of such laws were pointed out, and that our laws of succession after death were made more conformable to what is admittedly their true theory. It is time that we recognized, on the one hand, the right of the child is not to be disinherited without cause; and on the other hand, that no mere relationship to the deceased can give one person the right to millions of dollars which was the property of another and is now at the disposal of the State.

<sup>1</sup> Dalrymple, *Essay on Feuds*, Chapter on Succession; Wright on Tenures; Du Cange, *Glossarium*, tit. "Beneficium" and Feudum; Beames's *Glanvill*, pp. 1, 47.

<sup>2</sup> 6 *Glasson, Droits, &c. de l'Angleterre*, 234 *et seq.*; *Bl. Com. Bk. 2*, ch. "Devise;" Beames's *Glanvill*, 140, n.; *Mill, Pol. Econ. Bk. 2*, ch. 2, § 4; 40 *Edin. Rev.* 350.

<sup>3</sup> *Body of Liberties*, §§ 81, 83.

That last clause contains, I think, the key to the problem. A dead man's property is at the disposal of the State. All laws regulating successions after death are, Blackstone tells us, creatures of civil policy. The son has by nature no right to succeed to his father's land, nor is the father by nature entitled to direct the succession to his property after his own decease. He who would take it must establish his claim. And on the three principles from which we started, the child is entitled to a portion. But it by no means follows that he is entitled to the whole. The same reasoning which leads us to think that he ought to have a share of the property also indicates how large that share ought to be. On the one side, he should not be left in poverty; on the other, the good of the State requires that he should not be permitted to live in idleness. To so much he is entitled on all principles of natural right and civil policy, and to no more. These are elastic limits, and estimates of a child's proper share may, I suppose, vary from ten thousand dollars to one hundred thousand.

But when we come to the remote relatives, to a tenth cousin, for instance, on what ground will he rest his claim to the estate? "True, I never heard of this dead man," he must say, "until I was told that I was his next of kin. I never expected anything from him, nor should I have felt called upon in any way to assist him. But I am his nearest relative: give me the property." Surely a reasonable man would say, "You have not made out your case."

What, then, should become of the property? The answer is obvious; as no one has shown himself entitled to it the State should keep it.

I have not time elaborately to discuss the theory of wills. The general line of reasoning which I have suggested is even more applicable to them than to descent. The law has long held that a dead man could have no property, and that giving effect to his wishes is merely a bit of legal courtesy, so to speak. Gifts by will should, therefore, be valid only to a limited amount, and the rights of children should be protected, as those of the wife now are, beyond the power of the testator to destroy them. The French law has been in accord with these ideas ever since the Revolution of 1789.<sup>1</sup>

These suggestions seem very pertinent to the discussion at present going on over the advisability of Collateral Inheritance Taxes.

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<sup>1</sup> Hale, *Hist. Com. Law* (Runnington's ed.), 314, n.; 40 Ed. Rev. 350, Beames's *Glanvill*, 139, n.

The general theory of such laws is to tax lightly, or not at all, transmissions of property to the immediate family of the deceased, increasing the tax as the relationship becomes more remote. A bill on these lines was introduced into the last session of Congress;<sup>1</sup> a similar measure is at present before the Supreme Judicial Court of Massachusetts. Such laws seem to me a movement, vague and indefinite to be sure, but still in the right direction. They are no new thing. The Roman Emperor Augustus enacted a tax of this sort in the year 6, which, Gibbon says, furnished a large part of the Roman revenue.<sup>2</sup> England has long had similar statutes, and in 1892, derived from them an income of upwards of fifty million dollars. Many of our States have followed suit. In 1892, one-third of all the State taxes of New York were collected in this way. Most interesting of all are the laws of Switzerland which provided for a maximum tax of 20 per cent., and amount to a conscious attempt to regulate the succession to property on the principles for which I have been arguing.

It will no doubt be objected that my suggestions are impracticable; that I am assailing the rights of private property; that a man will not work if he cannot leave his fortune to his children. To the first point, I will make answer that in the long run the law has proved as clever as those who would evade it, and has accomplished things at first sight much more difficult than this. At any rate, it should not let injustice go on without even attempting to remedy it. As for impairing the rights of private property, — surely no one would say that “*The Principles of Political Economy*,” by Mr. John Stuart Mill, was a sensational work. Yet Mr. Mill takes pains to explain that descent on the death of the owner is not an incident of private property.<sup>3</sup> Starting from the side of the economist, he arrives at the same result which I have suggested from a lawyer's point of view.

To those who would cry that I discourage men from working, this answer can be made: the average American family consists of five members; if we assume that each individual may rightly inherit from \$50,000 to \$100,000 this objection will have no force till a man is worth from two hundred to four hundred thousand dollars, for to that amount his property will go exactly as he would have it. And I do not regard it as an unalleviated misfortune, if here in the United States of America, some men with four hundred thousand dollars should be driven — though I

<sup>1</sup> Harper's Weekly, 6th January, 1894.

<sup>3</sup> Pol. Econ. Bk. 2, ch. 2.

<sup>2</sup> Gibbon, ch. 6.



do not believe they would be — into something besides money-making ; into municipal affairs, for instance, or into charities, or even into enjoying themselves a little before their nervous prostration period comes. Surely too it is not worth while to purchase the labor of one generation with the idleness of all that are to come after.

It will perhaps be felt that I speak too speculatively and under-rate the so called " natural right " to inherit. Against other individuals the child (or near relative) certainly has a paramount title, because the deceased would have wished the property to go to him, and other things being equal the wishes of the former owner should prevail, as we have seen. But the contest is not between the child and another person ; it is between the child and the State, and the owner's wishes have never been allowed to override the dictates of public policy. The feudal law utterly disregarded them in order to concentrate property and preserve family power ; the State of to-day may rightly disregard them to secure the distribution of wealth. For the most important aspect of great fortunes is not the luxury which they engender, nor yet the envy and discontent which they excite ; it is the tremendous power which they give over men, and — it seems — over nations. We may well hesitate about depriving a man of what he himself has fought for and won by his ability or his luck. But to make his conquest hereditary, to put this enormous influence into the hands of a man who may be entirely unfitted for it, violates every principle of law and policy for which the government stands.

*James M. Morton, Jr.*

[Since this article was in proof the opinion has been handed down by the Supreme Judicial Court of Massachusetts in the Collateral Inheritance Tax Cases. It is believed that nothing there decided affects any of the positions which have been assumed in the foregoing discussion. But the learned Chief Justice appears to go out of his way to express his opinion that there is a right of inheritance or of handing down by descent—he is quite uncertain which—so protected by the Constitution that the State cannot destroy it by taxation. To be sure Chief Justice Marshall in *McCulloch v. Maryland* said (4 Wheaton, 427, 428), that the power to tax implied the power to destroy. But that case has been somewhat shaken, and there is authority for the proposition that a State cannot do indirectly what it cannot directly. The learned Chief Justice of Massachusetts must however assume a common-law right of some sort, either to transmit or to inherit property on the death of the owner. With great deference I feel confident that such a position is untenable without abandoning many statutes never heretofore questioned on constitutional grounds. Moreover, the common law of estates *pur autre vie* seems conclusively to show that, as to land at least, there was no common-law right in the relatives of a dead man to succeed to his property. For on a grant to A for the life of B, if A die leaving B, the land did not descend to A's relatives but went as *bonum vacans* to the occupant. 2 Bacon's Abr. 561 ; Co. Litt. Lib. 1, sec. 56.]

# HARVARD LAW REVIEW.

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## *Editorial Board.*

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THE LAW SCHOOL.—During this year and last two courses and four half courses have been added to the instruction offered. These are,—Persons, new this year, and given by Professor Smith; Insurance, this year made a full course and given by Professor Wambaugh; Damages and Conflict of Laws, half courses begun last year by Assistant Professor Beale. Contracts II., a new half course in contracts given by Professor Wambaugh; and Legal History, a half course which may be taken as a full course by permission, given by Professor Ames and Assistant Professor Beale jointly. These bring the total number of courses up to twenty-six and one-half, or twenty-seven if Legal History be taken as a full course; and they show that the supremacy of the school in quantity and quality of instruction is to be maintained.

The returns now at hand show a most gratifying increase in the numbers of the school. The third year class is the largest on record. Full statistics will be given in the December number.

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THE COMMON SENSE AND COMMON LAW OF INTERSTATE COMMERCE.—Judge Shiras, in the Circuit Court, Northern District of Iowa, in the case of *Murray v. Chicago & Northwestern Ry. Co.*, 62 Fed. Rep. 24, after a luminous and thorough discussion of the cases and *dicta* of the United States Supreme Court and the Federal courts, and a careful examination of the opinion of Judge Grosscup in the case of *Swift & Company v. Philadelphia R. R. Co.*, reported in 7 Harv. L. R. 488, dissents vigorously from the conclusions arrived at by Judge Grosscup in that case. The decision is a master piece of logic and keen reasoning, and demonstrates very forcibly the dangerous results to which Judge Grosscup's decision would lead.

He shows not only by historical considerations, the development and growth of law in the United States, and the analogy from equity and mari-

time jurisdictions, but also and more especially from the internal necessity of the case, that there must be a common law of the United States separate and distinct from that of the several States; that in the absence of statutory regulation by Congress, this national common law with the national system of equity and maritime law, affects and controls all legal relations as to which the Federal Government has exclusive jurisdiction.

Judge Shiras does not deny that the national jurisdiction in the regulation of interstate commerce is exclusive, and that therefore neither the statutory nor the common law of the several States can affect this subject-matter. But here the lines of reasoning diverge. Judge Grosscup, starting from the hypothesis that there is no national common law, gives an opinion, the natural and logical conclusion from which would be that before the Interstate Commerce Act, interstate commerce was entirely without legal sanction of any kind whatsoever; that therefore, not only was there no obligation imposed upon the common carrier, such as existed under the common law of England, to charge no more than reasonable rates or to carry for any one who offers to pay his charges, but, even in case of a contract to carry and a breach thereof, there could be no recovery because the contract itself would be without the sanction of any law. True it is, Judge Grosscup does not state these conclusions in his opinion, but they are the logical deductions therefrom.

Judge Shiras thinks, however, notwithstanding various *dicta* of the Supreme Court of the United States, that there is a common law of the United States distinct and separate from that of the several States; that before the Interstate Commerce Act was enacted, the common law of England, as it stood at the time of the Revolution, modified by the changed conditions of our country, governed and controlled all legal relations such as interstate commerce, as to which national regulation is exclusive; that therefore a common carrier was not only bound to accept goods for interstate commerce carriage from any person offering to pay reasonable charges, but that such carrier was also bound not to charge in excess of a reasonable rate, and that, under the sanction of the common law, excessive charges could be recovered back. The decision does not touch upon the effect of the Interstate Commerce Act, because the alleged overcharges were made before that Act went into effect.

Another interesting, though in no way doubtful point, decided in this case is that an action for the recovery of these excessive charges can be maintained in the State courts, and that the national exclusive control of interstate commerce does not, in the absence of statutory regulation to the contrary, give the Federal courts exclusive jurisdiction of causes arising out of interstate commerce transactions.

In this connection the valuable article of Professor Blewett Lee of the Northwestern University Law School, in 2 Northwestern Law Review, page 200 "Is there a Federal Common Law?" is worth noting. In it the opinion of Judge Grosscup in the Swift case is subjected to a powerful criticism, and a line of thought developed from an exhaustive review of the Federal authorities in accordance with that now expressed by Judge Shiras in the Murray case.

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DISPATCH,—The method of hearing argument by talking to counsel seems to be in vogue in England to-day, and the appellate courts seem to be on the *qui vive* for bad law and frivolous motions, ready to dis-



courage all but cases which they think worth arguing. This, if restrained by a wary anxiety to see any real chance of doubt and then allow full argument, must go far in weeding out from the rest really hopeless appeals, and so in adding to the speed and popularity of litigation. To give an instance of the new method, it is said that a plaintiff, an attorney, recently appeared *pro se* moving for a new trial of a libel action on the ground of misdirection. A bill had been sent him for an account which he had paid, and it had been opened by a clerk,—that was his libel. After he had argued five minutes, Lord Esher leaned forward and this is the substance of his remarks :—

“Mr. ———, if your complaint had been demurred to, the demurrer would have been sustained; if, at the trial, a motion for a nonsuit had been made it should have been granted; failing that, the jury ought to have found against you, as they did.” Then, leaning back again, he added, after a moment : “But I’m open to conviction. I’m open to conviction.”

In some hands this might do injustice. Even if the plaintiff had had a case for argument such a greeting might have diminished the force of his logic.

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CAN A MURDERER ACQUIRE A TITLE BY HIS CRIME?—In 4 H. L. R. 394 the opinion was expressed that one who murdered another in order to inherit the latter’s property acquired the legal title, but should be treated as a constructive trustee for those who suffered by his crime. That is in accordance with well-known equitable principles and reaches a just result. It would prevent the murderer from profiting by his crime, but would protect a purchaser for value without notice. Hitherto this view, while not adopted by the courts, has not been distinctly rejected by them. They have reached the same practical result, but by means which seem unjustifiable. In *Riggs v. Palmer*, 115 N. Y. 506, where the controversy was between the criminal and the representatives of the murdered man, the court read into the statute of wills a revocation clause. That would seem to carry judicial legislation too far. No considerations of humanity and natural justice can authorize a court to read an exception into a statute which is plain and definite in its terms. *Shellenberger v. Ransom* (Nebraska, 1891), 47 N. W. R. 700, followed the New York case and held that a purchaser from a murderer took nothing, because the murderer had nothing to give. Here an exception was read into the statute of descent, a course open to the same criticism as that just offered upon *Riggs v. Palmer*. In June, 1894, the Nebraska court reviewed their decision (59 N. W. R. 935), and concluded to go to the opposite extreme. They decide, and correctly it would seem, that the purchaser from the murderer acquires a legal title. But they go on and hold that he gets not only the legal title, but the beneficial interest as well, although he took with notice of the murder. This is a result which is not only “undesirable,” as the court say, but in violation of the plain equitable principle that one who acquires a legal title by fraud or other unconscionable conduct shall be treated as a constructive trustee for those whom he has wronged. The court seems to feel bound by the terms of the statute of descent. But that misconception is probably, as pointed out in 4. H. L. R. 394, one of the results of the fusion of law and equity.

It may be worth while to observe that the civil law, to which frequent reference is made in these cases, does not treat the will as revoked or the

heir as disinherited by his crime, as several of the judges appear to think. On the contrary, the legal title passes to the criminal and is thereafter taken from him. *Ereptio propter indignitatem* is a case not of revocation, but of restitution. See Windscheid, Pandekten III. § 669 & n. 1; lex 7, § 4. *D. de bonis damnatorum* (48, 20); *D. 34, 9, de his quæ ut indignis auferuntur*; Maynz, Cours, v. 3, § 482.

PARTY WALLS; QUASI CONTRACTUAL RIGHTS OF ADJOINING OWNERS.—In the recent case of *Walker et al. v. Stetson*, 38 N. E. R. 18, the Supreme Court of Massachusetts has made an interesting and important decision on the subject of party walls. The plaintiff had both added to the height of an ancient party wall between his estate and that of the defendant, and had, also, thickened and strengthened the part which was on his own land, in order to sustain a large building he was erecting. Sometime after this the defendant had also begun building operations, and, while thus engaged, had projected his beams into the wall, but not beyond his own side of the division line. There was no controversy on the part of the defendant as to his liability under a party wall agreement to pay for using the height added, but he contended that the court would be going too far in holding that the other additions became part of the wall, and that the defendant was, therefore, liable for a portion of the cost, though he had used the party wall no further than his rights allowed.

The plaintiff, on the other hand, maintained that, as the old wall, if carried up as it was, would not have conformed to the building law in force in the city of Boston, and as the defendant would, therefore, have been compelled to thicken it, it was only just and equitable that he should pay some proportion of an outlay from which he had derived undoubted benefit.

The court refused, nevertheless, to allow such compensation, or to enjoin the defendant from making any use of the wall, thus thickened and strengthened, to support the building which he had erected.

This decision, although undoubtedly a conservative one, appears on the whole a thoroughly sound one. It is, certainly, very hard to see any ground of legal liability, on which the defendant could have been compelled to contribute, since, throughout, he did nothing but what he had a perfect right to do,—namely, to use his own. Indeed the only chance under the circumstances that the plaintiff had, was to have the inspector of buildings stop the work as contrary to city regulations, and thus, by indirect means, to bring the defendant to terms,—a course which was pursued with success in a private controversy last winter in Boston. But, although this case, apparently, does not recommend itself to architects and builders (see *American Architect*, cited in 27 *Chicago Legal News*, p. 12) as fair or politic, it seems difficult to perceive how it could well have been otherwise decided after the erection was once completed.

RIPARIAN RIGHTS.—Questions concerning the rights of riparian owners in cases of alluvion and reliction, although not unimportant in this part of the country, occur more frequently and create more discussion in the west. While our Massachusetts judges are laying down working rules as to the equitable division of mud flats, judges in Missouri and Nebraska



are striving to comprehend the innumerable, prankish ramblings of the Mississippi and Missouri rivers, and to straighten out the property rights which have been thrown into dire confusion. Sometimes, it is an inland town which the "Father of Waters" has, by some unexpected twist, converted into a river port; or, again, some riparian city of prominence that it has landed high and dry, a couple of miles or so from the present channel. In *Gill v. Lydick*, 59 N. W. R. 104, and *Bouvier v. Stricklett*, 59 N. W. R. 550, the Missouri has by some of its land-jumping freaks elicited two excellent decisions from the Nebraska court, declarative of the best law on the subject. The first of these treats as unworthy of consideration that ancient and indefensible doctrine, which strives to distinguish between land left by alluvion and that left by reliction, and decides that in imperceptible increases or decreases, alike, the riparian owner either receives the profit or bears the loss, irrespective of the means by which the river had accomplished these transformations. The opposite phase of the doctrine, namely, the affecting of rights by sudden and perceptible changes in the river's course, is dealt with in the second case. There the stream, the middle of which formed the boundary of several estates, had suddenly abandoned its old channel and had made a new course for itself by cutting across a neck or bend. On these facts, the court held that the boundary lines should remain as before, in the middle of the former bed.

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LUMLEY v. WAGNER DENIED.—The case of *Lumley v. Wagner*, 1 De G. M. & G. 604, excited much comment at the time of its decision, and in the line of English cases to which it has given rise there is evidence of a desire not to go in any way beyond it, *Montague v. Flotoun*, L. R. 16 Equity 189, where an actor, defendant, was in effect restrained from doing anything at all but act for the plaintiff, being overruled at the first opportunity in *Whitwood Chem. Co. v. Hardman*, L. R. [1891] 2 Ch. 416. Such injunctions as that in *Lumley v. Wagner* have been granted in New York on more than one occasion, where the same desire to limit the effect of the rule has not been apparent. One is interested, therefore to find Mr. Justice O. W. Holmes denying the rule entirely in the recent case of *Rice v. D'Arville* (Mass. Suffolk Equity Session, September 29, 1894).

"It is agreed on all hands," he says, "that a court of equity will not attempt to compel a singer to perform a contract to sing. . . . If this is so, as is admitted, it appears to me, with all respect to judges who may have taken a different view, that there is no sufficient justification for saying to an artist that although I will not put him in prison if he refuses to keep his contract, I will prevent him from earning his living otherwise, as a more indirect means of compelling him to do the same thing. I do not quite see why, if an equitable remedy is to be given for the purpose of making an artist keep his contract, the usual remedy should not be given, and the whole of it; why, if I say, 'If you do not sing for the plaintiff you shall not sing elsewhere.' I should not say, 'If you do not sing for the plaintiff you shall go to prison.' I think the later English judges are quite alive to the force of these considerations, and simply bow to the authority of *Lumley v. Wagner*, which, of course, does not bind me."

Mr. Justice Holmes dwells a moment on the reason for refusal to say,



"You must sing," and seems inclined to put it on the score of difficulty in seeing whether "the artist in good faith and really has given the other party the benefit of the talents for which he was engaged." In addition to this may there not be a feeling against restraint of the personal liberty of the citizen? Doing personal service because one is ordered to under the pains and penalties which a court of equity can inflict, seems dangerously like temporary slavery. And might not a court well say, "This is too much to give, whether or no we can do it, even to one who asks for the letter of his bond."

JUDGMENT OR SATISFACTION. — The Massachusetts Court has divided nearly evenly over the question of whether title passes on a judgment in trover or on its satisfaction. The case, *Miller v. Hyde*, 37 N. E. R. 760, was this: The defendant, a servant of the plaintiff's intestate, sold a horse belonging to him to a third person. The plaintiff recovered a judgment in trover and attached the horse for execution. The defendant's vendee reattached the horse and plaintiff could get no satisfaction for her judgment. All this was in Connecticut. Later in Massachusetts the plaintiff replevied the horse from the vendee, and the question was whether she should succeed in that action.

The majority, holding that title remained in plaintiff till satisfaction, maintained that the second action would lie; the minority, that having chosen her remedy, plaintiff had no further action.

The case was doubtless a hard one for the plaintiff, because she had a worthless judgment debtor and was too poor originally to give bond for replevin; but having chosen between the devil and the deep sea, should she not have abided by her choice? What she had was a right to possession of the horse, which she agreed to extinguish for a right to damages, when she brought her action. It is for the law to say which she shall have. If it is the former, the plaintiff during the time between judgment and satisfaction has gained a right, the right to damages, which corresponds to nothing she has lost. By hypothesis she has the right of possession still unimpaired, and besides that a right to damages quite independent and unconditional upon her right of possession, because it cannot be said that the right to damages is not complete as soon as judgment is passed. Doubtless judgment would not be passed if the wrong had already been remedied, but after judgment the right to damages is not dependent upon satisfaction beyond itself.

Now of course it is possible for the law to confer such a right, but it is no less than a gift, and even though it do not subject a defendant to two actions, if it has any meaning at all, gives the plaintiff two, for a right without an action is an absurdity. As Mr. Justice Holmes remarks, the replevin of the horse does not satisfy the judgment, and it is still outstanding.

"Hard cases must not make bad law." Though the law could not do justice in this case without this decision, it will not do justice in others with it. Suppose after a judgment in trover the defendant sells the article to another, and the plaintiff being dissatisfied with his chances on the judgment replevies from the vendee. Is it better to have two men vexed once with a suit, than one twice? The latter is customarily not tolerated, why should the former be? Two remedies for one wrong are not usually allowed by the law; trover and replevin are now in Massachusetts exceptions for no reason which should not deny the whole rule.

## RECENT CASES.

**ADMISSION OF WOMEN TO PRACTISE AT THE BAR.** — Under the common law and the statutes of New Hampshire a woman may be licensed to practise as an attorney. *In re Ricker*, 29 Atl. Rep. 559 (N. H.). This decision places New Hampshire in accord with the majority of American jurisdictions in this matter. While the English courts have not as yet seen their way to admitting a woman to practise at the bar, the old common-law doctrine has been superseded very largely in this country, sometimes by statutory construction, as in Connecticut, *Hah's Case*, 50 Conn. 131, sometimes by direct enactment, as in Massachusetts, R. S. of Mass. 1882, c. 139. The objections to allowing a woman to practise, when she could plead coverture to any suit by a client on express or implied contract, are obvious; but now that she is almost universally liable on her separate contracts, there seems to be no legal reason why she should not assume the duties and responsibilities of the office.

**AGENCY — MASTER AND SERVANT — SERVANT NOT UNDER CONTROL OF MASTER.** — Action for injuries caused by negligence in the operation of an engine belonging to defendants, but which, together with its crew, at the time of the accident, was rented to and under the control of another company. *Held*, that defendants were not responsible. *Byrne v. Kansas City & C. R. Co.*, 61 Fed. Rep. 605.

The case follows the nearly universal rule of law on this point. *Rourke v. Colliery Co.*, 2 C. P. Div. 205; *Donovan v. Construction Syndicate*, 1 Q. B. [1893] 629; *Miller v. R. R. Co.*, 76 Iowa, 655. A different rule, however, prevails in Mississippi and Texas. *R. R. Co. v. Norwood*, 62 Miss. 565; *Burton v. R. R. Co.*, 61 Tex. 526. As the court point out, however, in the opinion in the principal case, this latter rule is due to a failure to distinguish between such cases as the one under consideration and the carriage cases. *Laugher v. Pointer*, 5 Barn. & C. 547, and *Quarman v. Burnett*, 6 M. & W. 499.

**AGENCY — VICE-PRINCIPAL — FELLOW-SERVANT.** — Plaintiff, while in defendant's employ as a hod-carrier, was injured by the collapse of a scaffold upon which he was required to work. This scaffold had been erected by a carpenter employed by defendant for this purpose, and it was through his negligent construction of it that the accident happened. *Held*, that the carpenter, being a vice-principal and not a fellow-servant, defendant was responsible for his negligence. *McNamara v. McDonough*, 36 Pac. Rep. 941 (Cal.).

In this case we find another instance of the inaccurate use of the term "vice-principal." Here defendant was under an absolute duty to furnish suitable appliances, which he could not escape by delegating. But if plaintiff had been injured by some personal negligence of the carpenter while constructing the scaffold, it would certainly be held the negligence of a fellow-servant, for which defendant would not be liable. On the other hand, an employer is liable for all the negligence of a vice-principal, as if it were his own, in jurisdictions where the real vice-principal doctrine prevails.

**COMMON CARRIER — NEGLIGENCE — CONTRACT TO RELIEVE FROM LIABILITY IN THE TRANSPORTATION OF LIVE STOCK.** — Where a contract for the shipment of cattle provides that the shipper shall care for them on the journey, and relieves the carrier from all liability except for negligence, *held*, an unreasonable delay in transportation exonerates the shipper from all further care, and the carrier must feed and water them thereafter. *Fit. Worth & D. C. Ry. Co. v. Daggett et al.*, 27 S. W. Rep. 185 (Tex.). The decision of the majority seems questionable on the facts recorded. The authorities on which they base their opinions, Lawson on Carriers, § 191, and *Kenny v. Raebury*, 59 Barb. 104, are cases of wilful malfeasance by the carrier involving delay in transportation which does not appear in the main case. It does appear that the accompanying drover had ample opportunity to care for the cattle after the accident occurred, but thought it was unnecessary. Granted that the drover is not guilty of contributory negligence, it seems unwarranted to hold the carrier for the mistaken opinion of a drover in regard to the needs of his stock. The rule of avoidable consequence also would seem to deny the right of a drover wholly to abandon cattle in case of undue delay, when it is apparent that this will greatly increase the amount of damages, while they can be cared for by himself with small expenditure of time and money.

**CONSTITUTIONAL LAW — DISPENSARY ACT.** — Act of December 24, 1892, forbidding the sale of liquors within the State by private individuals, and vesting the right to sell liquors exclusively in the State by certain designated officers and agents, the profits to



go to the State, held void as in violation of the State Constitution, since (1) it prevents the citizens of the State from carrying on a lawful trade, which can be done by the State only in the exercise of its police power. The Act in question is not a police regulation of business, since it is not intended to prohibit the sale of liquor, but to give the State a monopoly for the purpose of revenue; (2) a statute which embarks the State in trade is not within the legislative power conferred on the Assembly by the Constitution (Pope, J. *dissenting*). *McCullough et al v. Brown et al., County Board*, 19 S. E. Rep. 459 (So. Car.).

The dissenting justice takes the ground that the purpose of the statute is to regulate the sale of liquor, by providing that it be pure, that it be sold only on a written order, to one known to the seller, and in sealed packages, and not to raise revenue. He considers the Act, therefore, a proper use of the police power.

It is interesting to note that, since this decision, the South Carolina Court has declared an Act ostensibly differing from the one in question, but substantially the same, constitutional. This is due to the fact that Gary, J., a Tillmanite, has succeeded McGowan, J. Pope's dissenting opinion becomes the opinion of the court. The judges who held the former Act unconstitutional, of course, dissent. The decision has not yet appeared in the reports.

CONSTITUTIONAL LAW — EXCESSIVE DAMAGES — REMITTITUR. — *Held*, by a divided court, that when the court has reached the conclusion that, in an action at law, the damages allowed were excessive, it may designate the excess and cut down the verdict by remittitur. *Burdick v. Missouri Pac. Ry. Co.*, 27 S. W. Rep. 453 (Mo.).

The authorities upon this question are in conflict, but the present decision is in line with the majority of the American decisions.

The dissenting judges held that the question of damages is purely one of fact within the province of the jury, and for a court to substitute its verdict in any particular for that of the jury, violates the provision of the Constitution declaring the right of trial by jury inviolate. This would seem to be the correct view, for, as is said in the dissenting opinions, if the court may pare down the damages when it thinks they are excessive, why may it not increase the damages when it thinks they are too small, or why may it not change the verdict in any other respect it sees fit, and constitute itself judge of fact in place of the jury?

CONSTITUTIONAL LAW — INTERSTATE COMMERCE ACT — COMPULSORY SELF-INCRIMINATION. — In a proceeding against certain carriers, based upon the Interstate Commerce Act, defendant refused to testify, on the ground that the evidence would tend to criminate him personally. An Act of Congress, passed February 11, 1893, provides, in substance, that no person shall be excused from testifying in proceedings based upon the Interstate Commerce Act, on the ground that the same may tend to criminate him; but that no person so testifying shall be prosecuted on account of any transaction concerning which he may testify. *Held*, that the protection afforded by this Act was not co-extensive with the immunity granted by the Fifth Amendment of the Constitution, and hence defendants could not be forced to testify. *United States v. Fumes*, 60 Fed. Rep. 257.

This case goes a long step farther than *Counselman v. Hitchcock*, 142 U. S. 547, and holds that the Fifth Amendment not only protects a witness from the pains and penalties resulting from self incrimination, but also from the ignominy and disgrace, and that therefore no immunity granted by statute which compels a witness to criminate himself can be co-extensive with the immunity granted by the Constitution. This is a step that has never been taken before. A witness has never been protected from testifying because it would injure his reputation, and it could hardly be supposed that the Constitution meant to afford a witness any such novel immunity. Would it not be preferable, then, to look at the spirit rather than the letter of the Amendment, and so prevent an immunity from serving as a screen for lawbreakers? See 5 HARVARD LAW REVIEW, 24.

CONSTITUTIONAL LAW — POLICE POWER — GRAIN ELEVATORS. — A statute of North Dakota declared all grain elevators in the State, operated for profit, to be public warehouses, prescribed maximum rates for storage, and provided that the grain should be kept insured at the expense of the warehouseman. The plaintiff in error owned and operated a grain elevator for the exclusive purpose of purchasing grain to fill contracts of sale, but incidentally as his business would permit stored grain for others. While his elevator was only partly occupied he refused to receive the relator's wheat at the statutory charges because doing so would interfere with his own business, which he had a right to protect under Article 1, sec. 8, and the Fourteenth Amendment of the U. S. Constitution. *Held*, all the provisions of the statute were within the legitimate sphere of the legislative power of the State. *Brass v. State of N. D., ex rel. Stoesser*, 14 Sup. Ct. Rep. 857.



*Munn v. Ill.*, 94 U. S. 113, and *Budd v. New York*, 143 U. S. 517, affirmed.

This case has certainly gone beyond those it affirms. In the latter, statutes of Illinois and New York regulating charges for the storage of grain were held constitutional, but as the statutes were limited in their application to the great grain and commercial centres of Chicago, Buffalo, New York, and Brooklyn, the decisions were based partly upon the fact that in those cities the grain business had become "a practical monopoly to which the citizen was compelled to resort." Mr. Justice Bradley and Mr. Justice Miller who concurred in the judgment in *Munn v. Ill.*, so qualified the language in that case. 99 U. S. 700, 747; 118 U. S. 557, 569. The Dakota statute, on the other hand, not only applies to all the warehouses throughout the State but even requires the warehouseman to pay the cost of insurance though it be more than he receives for his whole service. "I am at a loss," remarked Mr. Justice Brewer in his dissenting opinion, "to perceive at what point the fact of monopoly will cease and freedom of business commence, for obviously elevators . . . were as plentiful as other institutions of industry and as easily and cheaply constructed." Field, Jackson, and White, JJ. also dissented.

CONTRACT — RESTRAINT OF TRADE. — *Held*, A combination of a number of brewers to enable the members who have entered into it to control the price of beer within the city, is illegal, being in restraint of trade. *Nester v. Continental Brewing Co.*, 29 Atl. Rep. 102 (Pa.).

This result has been reached almost invariably where an agreement has tended to raise prices, destroy competition, or create a monopoly. *Central Shade Roller Co. v. Cushman*, 143 Mass. 353, goes farthest of any case in supporting such a combination. It is possible to distinguish that case from the principal case, in that the restraint of trade there was not for an article of prime necessity or a staple of commerce, while in the principal case, assuming that beer is not an article of prime necessity, the court treats it as a staple of commerce, since it is an article of daily consumption.

COPYRIGHT IN PAINTINGS, — INFRINGEMENT OF BY LIVING PICTURES — Act. 25 and 26 Vict. c. 68, s. 1, provides that the author of every original painting shall have "the exclusive right of copying, engraving, reproducing and multiplying such painting and the design thereof by any means, and of any size for the term of his natural life." *Held*, the representation of a picture by a *tableau vivant*, formed by grouping in the same way as in the picture, living persons dressed in the same way and placed in the same attitudes as the figures in the picture, is not an infringement of copyright. *Hauffstaengl v. Empire Palace L. R.*, [1894] 2 Chan. Div. 1.

The decision is put on the ground that the Copyright Act was intended "to restrain people from producing something which would compete in the market with the originals or with authorized copies of them." The question of the painted canvas and grounds of the "living pictures" which were exact copies of the backgrounds of the originals, was expressly left open by agreement. It would seem, however, to be decided by the remarks quoted above.

Sketches of the *tableaux vivants* were published in the "Daily Graphic," and the author of the originals sought to restrain the "Graphic" from publishing them, but an injunction was refused. 29 Law Journal, 369. The court said, "The sketches were not calculated to interfere either with the artist's reputation or with the commercial value of his work."

CRIMINAL LAW — CARRYING CONCEALED WEAPONS. — *Held* (overruling the decision in *State v. Harrison*, 93 N. C. 605), that one who carries a concealed weapon for the purposes of sale is guilty under the statute against carrying concealed weapons, the criminal intent in such cases being the intent to carry the weapon concealed, not an intent to do any damage with it. *State v. Dixon*, 19 S. E. Rep. 364 (N. C.).

The courts of North Carolina seem now to have reached the true interpretation of their statute against carrying concealed weapons. The trial judge said truly: "That if one could borrow or procure a pistol to sell, or convey it about for several months trying to sell it, and shooting some five times on a picnic occasion, the statute would be a dead letter."

DAMAGES — RAILWAY ACCIDENT — INSANITY. — Where a passenger on a railway is made insane by the excitement of a collision but is uninjured bodily, the company is not liable therefor, as such insanity is not a natural and probable result of the accident. *Haile's Curator v. Texas & P. Ry. Co.*, 60 Fed. Rep. 557 (La.).

As long as *Schaffer v. Ry.*, 105 U. S. 249, remains good law in the United States courts such decisions as are necessitated by authority. It is very doubtful, however, if in either of these cases the court were warranted in assuming without reference to a jury that insanity was not a natural and probable result of a railway accident. Loss of power, whether mental or physical, would seem a legitimate item in damages; and

the fact that cases of this kind do occur and are litigated in the courts would seem to imply that resultant insanity from the shock is a more or less probable result of a collision.

**ELECTION — VALIDITY — EFFECT OF ILLEGAL APPOINTMENT OF BALLOT CLERKS.** — The election law requires the appointment by the commissioner of elections of two ballot clerks of opposite political parties. Where the commissioner acting without fraud appointed two extra clerks who helped the voters prepare their ballots, *held*, that the statute is directory not mandatory, and that no irregularities on the part of the election officers will vitiate an otherwise legal election unless it be shown that the result thereof was changed or rendered so uncertain as to make it impossible to obtain the true result. That the will of the people expressed at the polls must not be set aside because their officers acted informally. *Brannon, J. dissenting.* It is impossible to prove that ballots were altered and the result of the election changed. To require such proof is to nullify the statute. Elections are legal only when held in accordance with the statute, and when the statute is, as here, violated in an important particular they should be set aside. *Dial v. Hollandsworth*, 19 S. E. 557 (West Virginia).

**EQUITY JURISDICTION — FAILURE OF HUSBAND TO SUPPORT WIFE — ADVANCES BY THIRD PERSON.** — A husband deserted his wife without making any provision for her support. Plaintiff advanced money to her for the purchase of necessities. *Held*, an equitable debt is created and plaintiff may recover the money so advanced by suit in equity. (*Leuppi v. Osborn's Ex'rs*, 29 Atl. Rep. 433 (N. J.).

The court follow the principles laid down in *Kenyon v. Farris*, 47 Conn. 510. Compare also Keener on Quasi Contracts, 341-353.

**EQUITY JURISDICTION — SPECIFIC PERFORMANCE OF CONTRACTS.** — The court will not decree specific performance of negative covenants by an actress, in a contract with a manager when the object is indirectly to secure performance of the affirmative covenants. *Lumley v. Wagner*, 1 De G. M. & G. 604; denied, *Rice v. D'Arville*, Boston Transcript, Sept. 29, 1894, Mass., Suffolk Equity Session, — Holmes, J.

See NOTES.

**EVIDENCE — NEGLIGENCE — ALTERATION AFTER ACCIDENT.** — As evidence that an accident on defendant's railroad was caused by its negligence in maintaining an unsuitable switch, plaintiff offered to show that after the accident defendant removed the switch and replaced it by one of another kind. *Held*, inadmissible evidence (overruling *Martin v. Toule*, 59 N. H. 31). *Altrich v. Concord and Montreal R. R.* 29 Atl. Rep. 408 (N. H.).

New Hampshire, by adopting this rule of exclusion of evidence, has come into line with the great weight of authority. This is the rule in England, *Hart v. R. R. Co.* 21 L. T. (N. S.) 261, as well as in the United States Supreme Court, *R. R. Co. v. Hawthorne*, 144 U. S. 202. Pennsylvania and Kansas are probably the only States which now hold the contrary view.

**EVIDENCE — PAROL — CONDITIONAL — DELIVERY OF SEALED INSTRUMENT.** — Delivery of an instrument to a party thereto, when not relating to real estate, may be shown to have been given on a parol condition that it should not take effect until the happening or doing of something, although the instrument be under seal, at least where the seal is not required for its validity. *Blewitt v. Boorum et al.*, 37 N. E. Rep. 119 (N. Y.).

This case is the first which brings up in New York the question whether the fact of there being a seal on the instrument is sufficient to prevent the introduction of evidence as to the condition attached to the delivery. The case does not decide more than that where the seal is superfluous, — is not necessary for the validity of the instrument, — the evidence is admissible. The court, however, intimate strongly that it should be admitted also in cases where the seal is necessary, the basis of the opinion being that such evidence is not introduced to vary the writing, but to show that no agreement ever existed. A clear distinction is drawn between such instruments as the one in the principal case and those involving real estate, in regard to which the law in New York is settled that a conditional delivery cannot be made to the grantee, but to be valid as an escrow it must be made to some third person. *Braman v. Bingham*, 26 N. Y. 483; *Wallace v. Berdell*, 97 N. Y. 13. The decision in the principle case follows the English rule. *Bowker v. Burdekin*, 11 M. & W. 127; *Gudgen v. Bessett*, 6 El. & Bl. 986.

**JUDGMENT — JOINT CONTRACTOR.** — An unsatisfied judgment against one joint contractor on a check given by him alone for the joint debt, is not a bar to an action against the other joint contractor on the original agreement. The defendant and T. jointly guaranteed the payment of a third party's rent. The rent being in arrear T. gave the plaintiff his check for the amount. The plaintiff sued T. on the check and



recovered judgment which was not satisfied. The plaintiff then sued the defendant on the original guarantee. *Held*, that the causes of action upon the check and upon the guarantee were not the same, and that the judgment against T. afforded no defence to the action. (*Drake v. Mitchell*, 3 East, 251, followed; *Cambeport v. Chapman*, L. R. 19 Q. B. D. 229, disapproved.) *Weggs v. Prosser v. Evans*, L. R. [1894], 2 Q. B. 101. Wills, J., in his opinion goes carefully over the authorities and comes to the conclusion that *Drake v. Mitchell*, and *Cambeport v. Chapman*, decided opposite ways, cannot be distinguished from the principle case or from each other, although the court in deciding the latter case had attempted to distinguish it from *Drake v. Mitchell*. He therefore follows the earlier case, which has been treated as law without disapproval until the decision of *Cambeport v. Chapman*.

**MORTGAGE—FORECLOSURE—STATUTE OF LIMITATION.**—In an action to foreclose a mortgage where the plea was the statute of limitations, *held*, that an action to foreclose is an action on a specialty and not an action for the recovery of title or possession of real estate, since its purpose was not to give the mortgagee title or possession, but to have the land sold and the proceeds used in payment of the debt. *Kerr v. Lydecker*, 37 N. E. Rep. 267 (Ohio).

The above seems to be the rule in a few States,—California, Texas, Iowa, and Illinois. But the general rule is the other way, that the period of limitation for mortgages is the same as for any claim to lands where some one has held the lands adversely. This seems right on principle, as the title is in the mortgagee, and, that being so, the same limitation should apply as in an ordinary case.

**PROMOTERS OF CORPORATIONS—INTEREST IN SALE TO COMPANY.**—An owner of patents and a promoter made a secret agreement that the latter should form a stock company to purchase the patents and manufacture under them, and that the patentee should pay the promoter one half the price received. *Held*, the company may recover from the promoter his secret profits. The grounds of liability are two: (1) that the promoter stands in a fiduciary relation to the company, (2) fraud, in not making full disclosure to the company of his relations with the property which is the subject of the deal. *Yale Gas-Stove Co v. Wilcox et ux.*, 29 Atl. Rep. 303 (Conn.).

The decision is not that a promoter may not form a company to buy something in which he is interested, but only that, if he does so, he must make the directors of the company aware that he has an interest. The case where a promoter buys the thing outright from the owner, and then forms a company and sells it at an advance, is distinguishable, for there no part of the purchase-money paid to the original owner comes out of the company.

**QUASI-CONTRACTS—RECOVERY OF MONEY USED BY THIRD PERSON TO COVER DEFALCATION.**—Defendant's manager, who had no authority to borrow money or to overdraw defendants' bank account, borrowed money of plaintiff, giving a check signed in his name by procuration for defendants. The manager had overdrawn defendants' accounts and borrowed the money for his own purposes to replace money of defendants which he had abstracted, paid the money into defendants' account at their bank, and used it to pay the wages of defendants' workmen. *Held*, as the money had found its way into defendants' possession and been employed for their benefit, it was money received to the use of plaintiff, who is entitled to recover though defendants did not know of the borrowing. *Reid v. Rigby & Co.*, I. R. (1894) 2 Q. B. 40.

The case is obscure as to whether the manager actually used the money so borrowed to replace the money abstracted by him. It would seem that he did. If this is so, it is submitted that plaintiff should not recover. The manager used the borrowed money to pay a debt of his, *i. e.*, defendants' claim against him for the money abstracted, and plaintiff can follow it no further since defendants took it in payment of a legal claim. What defendants did with it after so receiving it is not material. In *Craft v. South Boston R. R.*, 150 Mass. 207, the treasurer of a corporation obtained money from the plaintiff by false pretences and used it to cover up his defalcations, by paying debts of the corporation. In an action for money had and received, a recovery was not allowed. That case seems to be similar to the one under discussion. See also in this connection 33 Cal. 134, p. 147, and Keener on Quasi-Contracts, 330-334. Neither in this case nor in *Craft v. South Boston R. R.* does the question seem to have been raised whether the guilty knowledge of the agent in receiving the money to be regarded in law as the knowledge of the principal. On this point see *Atlantic Mills v. Indian Orchard Mills*, 147 Mass. 268, 273.

**REAL PROPERTY—COVENANTS RUNNING WITH THE LAND—PRIVITY OF ESTATE.**—Land was conveyed to a wife separately, who occupied it, while the husband had possession. Under these circumstances the husband covenanted merely as to his



wife's seisin. *Held*, that the husband was liable to a subsequent grantee of the wife's on their covenant of warranty. *Nygatt et al. v. Coe*, 36 N. E. Rep. 870 (N. Y.).

In nearly all jurisdictions not already bound by authority, the law is in line with the principal case. In this country, at least, common sense required a departure from the doctrine of *Aoke v. Auder*. In New York, in 1830, *Beddoe v. Wadsworth*, 21 Wend. 120, held that if the grantor was in possession under a claim of title the covenant would run with the land. The furthest point actually decided is in *Wial v. Larkin*, 54 Ill. 489 (see also Co Vt. 94), which held that possession in the original covenantor was not necessary, but that if the covenantee gets possession before he assigns, the covenant will run with the land. It would seem that having gone so far a further step would necessarily follow, and that, disregarding the question of possession in either the covenantor or the covenantee, the only possession necessary to make the covenant run should be that of the subsequent assignee who sues. It would seem that in Massachusetts the old doctrine would still be followed. *Slater v. Rawson*, 6 Met. 439. For a valuable discussion of this point see Rawle on Covenants for Title, 5th ed., §§ 232-236.

**REAL PROPERTY — LEASE — CONDITIONS.** — The lease contained a covenant not to underlet or assign without lessor's license, and by the terms of the lease the lessor could re-enter for breach of any covenants. The lessor gave a license to the lessee to assign his term to a certain person, but stated in it that no further assignment should be made without his (lessor's) license. The assignee agreed with the assignor to conform to the terms of the lease. The assignee assigns to defendant without the lessor's license and the latter brings an action to recover possession. *Held*, the assignee was bound by the covenant and condition and lessor can recover. *Kew v. Trainor*, 37 N. E. Rep. 223 (Ill.).

This decision takes much that is objectionable out of the rule laid down in *Dumport's Case*, 4 Co. 119 b. If the lessor can, by expressly stating in his license that it applies only to the one assignment, avoid the application of the rule, such a course will always be adopted by lessors and the rule will never take effect.

**REAL PROPERTY — PARTY WALLS — ADDITIONS WHOLLY ON LAND OF ONE OWNER.** — Plaintiffs and defendant own adjoining pieces of land. In the deeds to plaintiffs' and defendant's predecessors from the city of Boston, which originally owned both pieces of land, are provisions that "the owner of the premises conveyed may build one-half of the division wall on the adjoining lots, which half, when used by the owners of the adjoining lots for building purposes, is to be paid for by them to the extent so used." Plaintiffs, after acquiring their land, wished to build a higher block, and strengthened the wall on their side, as well as building it up. Defendant made use of the wall in increasing the height of his own block, and now plaintiffs seek to recover not only for the use of the old party wall as carried up, but also for the additions in thickening and strengthening it. *Held*, plaintiffs can recover only for the use of the old party wall as carried up. *Walker et al. v. Stetson*, 38 N. E. 18 (Mass.). See NOTES.

**REAL PROPERTY — PRESCRIPTION — NUISANCE.** — Bill by the Board of Health to abate a nuisance. The defendant carried on the business of fat rendering, which caused noxious odors injurious to the health of the neighbors. The defendant had carried on the business for twenty-eight years, and claimed a right by prescription to continue it. *Held* (following *Com. v. Upton*, 6 Gray, 473): 1. Carrying on an offensive trade for twenty years in a place remote from buildings and public roads does not entitle the owner to continue it in the same place after houses have been built and roads laid out, to the occupants of and travellers upon which it is a nuisance, because in such a case there is no adverse use of another's property; 2. No right to prescription can be obtained against the public. *Board of Health of North Brunswick v. Lederer et al.*, 29 Atl. Rep. 444 (N. J.).

The decision follows the weight of authority in America and England.

**REAL PROPERTY — RIPARIAN RIGHTS.** — "RELICION." — *Held*, that land formed by the gradual and imperceptible receding of the Missouri River belongs to the riparian owner. *Gill v. Lydick et al.*, 59 N. W. Rep. 104 (Neb.). See NOTES.

**REAL PROPERTY — RIPARIAN RIGHTS — ALLUVION.** — *Held*, that riparian owner must stand the loss caused by the gradual abrasion of the Missouri River, but that he still owned the land separated from the remainder of his tract by a sudden change of the river's course. *Bourier v. Stricklett*, 59 N. W. Rep. 550 (Neb.). See NOTES.

**TENANTS IN COMMON — RIGHT OF NON-OCCUPYING TENANT IN COMMON TO RECOVER FOR USE AND OCCUPATION.** — One tenant in common allowed the other to occupy the whole property with no agreement, and now brings assumpsit for use and

occupation. *Held*, he can recover (Carpenter and Smith, JJ. *dissenting*). *Gage v. Gage*, 29 Atl. Rep. 543 (N. H.); s. c. 66 N. H. 282.

This decision is contrary to several *dicta* in New Hampshire, — *Berry v. Whidden*, 62 N. H. 473, and at least one decision, — *Webster v. Cates*, 47 N. H. 289; but brings New Hampshire in line with the general rule, usually laid down by statute, however, — Stimson's American Statute Law, § 1378. The courts, as a rule, have refused to decide this question as the majority of this court has had the courage to do, but have adhered to the old common-law doctrine that one tenant in common could not sue another for a division of the profits if the latter has had more than his share. By various American and English statutes, this old view has been done away with, so that this case was about the only one unprovided for, — *i.e.*, the case where one tenant allows the other to occupy all. There seems to be no reason, apart from the historical one, why such an action should not be allowed.

But whatever view may be taken of the result reached in this case, there can be no doubt as to the ability and vigor of the dissenting opinion, in which Carpenter, J. contends that judges have no right to "make law." However jurists may differ as to this last proposition, one thing is clear, that if judges *are* to legislate, they should do so openly, and not "under cover of vague and indeterminate phrases."

TORTS — MALICIOUS DIVERSION OF WATER. — The defendant intentionally so drained a marsh on his land as to divert the water from the plaintiff's land, where it was used for irrigation. *Held*, that since the action was intentionally injurious to the plaintiff, it is immaterial whether a stream or only percolating waters were diverted, the defendant being liable in either case. *Bartlett v. O'Connor*, 36 Pac. Rep. 513 (Cal.).

This decision is a too hasty disposal of a troublesome question, since it is apparently the first case in California on the point at issue. The court dub the defendant's act "malicious injury," and give the case no further consideration, not citing a single case in support of the conclusion reached. Yet the weight of authority is against the proposition laid down — that a lawful act upon one's own land may become unlawful by reason of an improper motive. It is, perhaps, fair to say, however, that the tendency of the courts is to extend liability for purely malicious acts which would not be unlawful if done without the sole intent to injure.

TORTS — TRESPASS — INJURY TO CATTLE BY EATING OF POISONOUS TREE WHOLLY WITHIN NEIGHBOR'S BOUNDARY. — Plaintiff and defendant were adjoining proprietors, their estates being separated by a ditch and a fence. Both the ditch and the fence were on the defendant's land. The plaintiff's property abutted on the ditch, on the other side of which, and some feet within the defendant's boundary, ran the fence. Inside the fence, on the defendant's land, grew a yew tree, the branches of which overhung the ditch, but no part of which extended to the plaintiff's boundary. There was no obligation on either side to fence. The plaintiff's horse ate of the branches of the tree and died therefrom. In an action to recover the value of the horse, *held*, that the defendants are not liable, as there is no duty on them to prevent their neighbors' animals from having access to the tree. *Ponting v. Noakes et al.*, L. R. [1894], 2 Q. B. 281.

No other decision was possible on the facts. If the defendant had been under obligation to fence, and from neglect of this the injury had happened, the plaintiff could have recovered. *Lawrence v. Jenkins*, L. R. 8 Q. B. 274. But the horse in this case is a trespasser, and the defendant is under no liability to keep his premises in safe condition for trespassing animals, provided he does not wilfully entice them to their destruction. *Jordin v. Crump*, 8 M. & W. 782. The plaintiff endeavors to bring his case within the authority of *Fletcher v. Rylands*, but the court disposes of the point by observing that the authority of that case is applicable only when some dangerous substance escapes from the defendant's land, while in the main case it is admitted that the poisonous branches were wholly within the defendant's boundaries.

TROVER — PASSING TITLE BY JUDGMENT. — Plaintiff recovered judgment in trover in Connecticut. Failing of satisfaction, she bought replevin in Massachusetts. *Held*, by a divided court, four judges against three, that the action could be maintained. Title does not pass to defendant in trover until satisfaction of judgment. *Miller v. Hyde*, 37 N. E. Rep. 760 (Mass.). See NOTES.

TRUSTS — CAN A MURDERER ACQUIRE TITLE BY HIS CRIME? — A. murdered his daughter, obtained her property by descent, and sold to the defendants, who had notice of his crime when they bought. *Held*, that they acquired a good title. *Shellenberger v. Ransom*, 59 N. W. R. 935 (Nebraska), reversing s. c. 47 N. W. R. 700. See NOTES.

TRUSTS — DEPOSIT OF CHECK FOR COLLECTION. — The plaintiff deposited in bank A. a check payable to his order indorsed "for deposit to the credit" of the



payee. Without further arrangement the plaintiff was credited with the amount, and bank A. was in turn credited by its correspondent bank B. Before the check was paid by bank C. on which it was drawn, bank A. became insolvent, its account with bank B. at the time being overdrawn. *Held*, as the plaintiff was credited with the deposit against which he might have drawn, the property in the check vested in bank A., and therefore a perfect title was conferred upon bank B. *Ditch et al. v. Western Nat. Bk.*, 29 Atl. Rep. 72, 138 (Md.).

It is submitted that the dissenting opinion is by far the better one. The indorsement on the check "for deposit to the credit of" the payee was notice to bank B. that bank A. held the check in trust for the purpose of collecting the proceeds and depositing them to the credit of the plaintiff. Such an indorsement is not absolute, and does not pass the beneficial interest in the check till it is paid. Bank B. was simply in the position of a sub-trustee. The fact that the depositor is credited with the amount, and allowed to draw against it, is a mere gratuitous privilege, and not conclusive evidence that title passes absolutely. If the check had been dishonored, the plaintiff would have unquestionably been charged. *Ames Cases on Trust*, pp. 11, 17; *Daniel on Neg. Instr.* (4th ed.), § 340 *a, et seq.*

**WILLS — WITNESSES — COMPETENCY.** — The husband of one legatee and the wife of another were attesting witnesses. The question was whether the statute, which declares that "any beneficial devise, legacy, or interest" to a subscribing witness is void, renders the legacies to the wife and husband of the subscribing witnesses void, and leaves the will good, or renders the whole will bad. *Held*, the whole will is bad. *Fisher v. Spence*, 37 N. E. Rep. 314 (Ill.).

This is a case of first impression in this jurisdiction, and the matter is well discussed. The court recognizes that there are two sides to the question, and prefers to adopt the Massachusetts view. *Sullivan v. Sullivan*, 106 Mass. 474. This view, of course, is obtainable by strict construction of the statute; but the contrary doctrine, which obtains in New York and Maine (*Jackson v. Wood*, 1 Johns. 163; *Winslow v. Kimball*, 25 Me. 493), appeals to one's common sense to so great an extent that it seems odd a court, not bound by precedent, would refuse to adopt it.

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## REVIEWS.

A TREATISE ON THE LAW OF RES JUDICATA, INCLUDING THE DOCTRINES OF JURISDICTION, BAR BY SUIT, AND LIS PENDENS. By Hukim Chand, M. A. London: William Clowes and Sons; Edinburgh: William Green and Sons. 1894.

A principal object of the author of this interesting treatise (who is Chief Judge of the City Court and member of the Legislative Council of Hyderabad, Deccan), is "to show the great advantage to the administration of justice, of the knowledge of contemporary laws and decisions in other countries." This object has been most faithfully and successfully carried out. An enormous mass of authority has been intelligently gathered from the reports and from approved text-writers of England and the United States, as well as from the states of British India; and the advantage thereby gained is surely no slight one. Four thousand cases are cited on this rather narrow branch of the law, of which more than half appear to be American cases.

In order to effect his design of making the Indian and American cases known in each other's courts, the author has stated the facts more fully than is usual in books of the sort, and has given many well-chosen extracts from the opinions of the courts. The result is a mass of material almost bewildering in amount. One realizes as never before the extent of sway of the English law. The House of Lords, Texas, and Allahabad jostle one another in the foot-notes, while Hindoo widows, the *Shebait* of



an idol, and one's "right to take a *cupola* to a certain temple and to place it upon the car of the idol, and to take a *nandicola* with *tom toms* from his house to the temple, and to offer the first cocoanut to the idol" are in question on almost the next page to a quotation from Vanfleet on Collateral Attack, and from an opinion of Folger, J.; and the same principles of law govern all.

That a foreigner should deal with so many diverse American authorities as an American would do is not to be expected; and Judge Chand rightly estimates his authorities only at their intrinsic value. The Supreme Courts of the United States, Nevada, Massachusetts, and New York, the New York Court of Appeals, and the editorial force of the American and English Encyclopædia of Law seem to be stars of equal magnitude in our legal firmament, when seen from the longitude of Hyderabad. And we must thank the author for showing us how slight the difference is, in real weight of legal reasoning, between opinions delivered in our courts of high authority and in those usually less approved.

The chief defect of the book seems to be a failure thoroughly to digest the material. We get great light by a comparison of the American and Indian cases; but the different divisions of the subject do not illuminate each other as much as they might perhaps be made to do. Nor are the author's own conclusions always sufficiently emphasized; we are left to deal with the cases as best we can, without that help from general knowledge of the subject which it is the jurist's chief duty to supply. In some places apparently contradictory statements of the law are made and supported by authority, with no attempt to reconcile the cases. This fault seems however to be as rare as is customary in books on the law.

In one or two cases when a principle is put forward it is impossible to support it; as where, for instance (at Sect. 148), the author adopts the continental notion that "the domicile of the debtor (in its wide sense) is generally to give the law of the obligation." This continental doctrine has probably never been adopted by a court of common law, — fortunately, for we have enough trouble with the dispute between *lex loci contractus* and *lex loci solutionis*.

On the whole, the book is one to be cordially welcomed; and one that may well find a wide use in our country. The mere fact that the decisions of three great nations are brought together is enough to secure the work that place in legal literature which is due to useful originality and broad learning. But besides this, it gives to the American lawyer a collection of American authorities equal to that contained in any work on the subject by an author of his own country; and to the student of law it presents a fascinating picture of the application of the common law to new and strange circumstances.

J. H. B.

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THE HISTORICAL DEVELOPMENT OF THE JURY SYSTEM. By Maximus A. Lesser, A.M., LL.B., Rochester: Lawyers' Co-operative Publishing Company. 12 mo. pp. 274.

The true student of the law to-day does not rest contented with a mere acquaintance with so important a legal institution as the jury as it exists in its present form. He demands also a knowledge of the times which gave it birth, and the circumstances under which it was welded into its present shape. To trace this development, to bring clearly before the reader the best views on the history of this institution, is the object of

this book. Within a comparatively small space is here presented the various phases of jury trial, existing at different times and under different circumstances, in Athens, in Rome, in Ancient Germany, and in England, past and present.

In the treatment of such a subject, one which has been so carefully and thoroughly investigated, new material was hardly to be expected; nor, indeed, does our author pretend to any originality of research, but predicates his claim for consideration rather on originality in the treatment and presentation of data already at hand, than on bringing to light any new historical facts.

It is upon old and reliable books that he has built his labor, rather than upon the original multi-perplexed sources,—sometimes, we fear, to the exclusion of more recent, if not, as well, accepted authorities, which might better have been consulted, such as Aristotle's recently discovered treatise on the Athenian constitution. These well-established writers, before referred to, are quoted extensively, while the author's own boiling down of the information he has digested, is given a less prominent position. Occasionally, this system of excerpting leads to his falling into some slight errors, usually of collateral matter, which he had, perhaps unconsciously, transcribed from some well-known, though, in this instance, faulty authority.

The book is, on the whole, a good one, well arranged, readable and interesting, especially the last chapter, "The Present Aspect of the Jury," and giving a very satisfactory and clear notion of what is regarded, according to the most widely accepted theory, as the origin and development of the English Jury.

D. A. E.

PRINCIPLES OF CONTRACTS. By Sir Frederick Pollock, Bart. Sixth Edition. London: Stevens and Sons. 1894. 7vo. pp. xlviii. 760.

While new editions of law books are very apt in many cases to consist of the old material, with insertions and notes by the editor which hardly add to the value of the text, in this, the sixth edition of Sir Frederick Pollock's work on contracts, a book too well known to require comment, we have a refreshing exception to the usual rule. The passages on the history of the action of Assumpsit and the doctrine of Consideration, although substantially the same as in the past, have been both revised and improved, while the paragraphs on agreements in restraint of trade have been to some extent rewritten, "in consequence," our author explains, "of the series of important judgements delivered in the court of appeals within the last few years, in cases of that class."

As no part of the law of contracts is more transitional and prone to new development than that which deals with agreements against public policy, those in restraint of trade in particular, this addition to the book is both valuable and necessary, showing as it does the expansion of that doctrine in the past few years. The other changes, too, although made in a more settled part of the law, and presenting rather new treatment of old subjects than any recent legal development, are both interesting and instructive. The history of the action of Assumpsit is laid down according to the best and most recent research, and various decisions and doctrines in the law of Consideration have been reconsidered in the light of more recent criticism. These improvements, although necessarily re-



stricted in scope, are, nevertheless, important ones, and add much to the value of the book to all careful students of the law.

As practically the same law of contracts prevails on either side of the ocean, this volume will probably be used here as well as in England, superseding the "American" as well as other earlier editions, and ranking even higher than previously in the legal world.

D. A. E.

A SELECTION OF CASES AND OTHER AUTHORITIES UPON CRIMINAL LAW.

By Joseph Henry Beale, Jr., Assistant Professor of Law in Harvard University. Cambridge: Harvard Law Review Publishing Association. 1894. 8vo. pp. 983.

These cases are selected and edited after the manner of other collections of the kind in use in the Harvard Law School. That is, they consist not merely of leading cases and authorities for what is law, but also of many decisions whose authority may be questioned, or rejected altogether. The object is not simply to furnish a systematic outline of the law itself, but to train the student to do sound legal reasoning for himself. They are accordingly used to best advantage with the aid of a teacher. That does not mean, however, that the teacher is confined to one method of instruction. The case-method is not a method of instruction, but of study. Most of the objections to it would vanish if this fact were more clearly appreciated.

A few of these cases, decided during the first ten years of James I., are now printed for the first time, being taken from an old manuscript presented to the Harvard Law School in 1835, by J. J. Wilkinson, Esq., of the Temple, London.

As these cases are primarily designed for use in schools, the head notes are omitted. But a full index will make the book useful to practicing lawyers.

F. B. W.

COMMENTARIES ON AMERICAN LAW. By James Kent, LL. D., Chancellor of the State of New York. Edited by Wm. Hardcastle Brown, Author of an Edition (*sic.*) of Blackstone's Commentaries, etc. St. Paul, Minn: West Publishing Co. 1894. 8vo. pp. xv. 926.

Every lawyer knows the present bulk of Kent's Commentaries and the way in which the text is overlaid, even smothered, with notes. Feeling that the student is somewhat overtaxed thereby Mr. Browne has discarded the notes; and feeling that the well rounded periods of the great American Chancellor are too diffuse for some students of to-day who want before all things brevity, Mr. Browne has gone over the text itself with an unsparing hand, making almost every statement shorter, changing bits of the phrasing in almost every sentence, and putting in prefatory catch-words in black type, but nowhere attempting anything but condensation. Now less than nine hundred pages in this volume represent the text of all Kent's Commentaries. The student who can get from this what students have hitherto sought in the unabridged edition will save much valuable time and the purchase money of three octavo volumes. To many this will over-balance the loss of notes, though they be by Mr. Justice Holmes, and of Mr. Chancellor Kent's own graceful style.

R. W. H.



DIE KONTROLLE ÜBER DIE GESETZGEBUNG IN DEN VEREINIGTEN STAATEN VON NORD-AMERIKA UND DEREN GLIEDERN. Von Dr. Amos S. Hershey. Heidelberg: J. Hörning. 1894. 8vo. pp. 71.

This little work originated in Professor Jellinek's Seminar of Public Law at Heidelberg. It treats of the various checks and limitations imposed on the legislative power, not merely in the Federal Government, but in the individual States. The chief restraints noticed are the veto-power, the power of the courts to test the constitutionality of statutes, and the direct participation of the electors in legislation through constitutional conventions and the referendum. The author has not merely explained the nature of these restrictions, but has also given a brief historical account of their origin and added some observations on their practical working. He writes with force and clearness, and has arranged his material admirably. The sections on the referendum, or submission of legislative questions to the decision of the electors directly, are especially good. While presenting nothing especially new to the American student of constitutional law and politics, the book is well worthy of perusal as a clear and concise statement of the subject.

F. B. W.

HAND BOOK OF COMMON-LAW PLEADING. By Benjamin J. Shipman. St. Paul, Minn: West Publishing Co. 1894. 8vo. pp. xii. 370.

Mr. Shipman's work contains, what its title does not suggest, a great deal of general information as well in questions of practice as of pleading. The book is written in a clear and simple style, well adapted to a student's needs, and ought to serve its purpose of making students understand the common-law procedure. In a book of so much merit of simplicity and fulness it is to be regretted that the leading principles in black letter type do not at all show the effect of thorough testing and revision, such as is advisable when an author undertakes the dangerous and difficult task of supplying *multum in parvo*. For instance, one "leading principle" is "Evidence is relevant to an issue which tends in any degree to prove it," and the needless warning is given in "elucidating" commentary on this that relevancy is "a matter often difficult of determination." But these, although not the only serious slips, are, perhaps, not fair samples of the general run of the book, which is on the whole apt for its purpose.

R. W. H.

A SELECTION OF AUTHORITIES ON DESCENT, WILLS AND ADMINISTRATION. By Nathan Abbott, Professor of Law in Northwestern University, Chicago. St. Paul: West Publ. Co. 1894. 8vo. pp. 751.

This volume differs materially from other works of the same character, both in form and arrangement. The author has made his selection from three different sources, and accordingly divided the book into three parts. The first part, called the Text, consists of excerpts from standard textbooks, selected with a view to filling up, in some measure, the gaps in the development of a subject by cases alone. Each excerpt is accompanied by references to the relevant cases, and these cases constitute the second part. The third part is made up of a full collection of statutes on the subject. Where so many selections from law treatises and so many statutes are printed, this arrangement is probably the best. The book will be of especial value to students who are reading law by themselves without the aid of a teacher.

F. B. W.

WEBB'S POLLOCK ON TORTS. Enlarged American edition. By James Avery Webb. The F. H. Thomas Law Book Co., St. Louis, Mo. 1894. pp. xxvi. 803.

This book is a reprint of the text of the English edition, with additions by the editor merely in brief summaries of the American cases and infinite references. The appendices of the English edition are omitted, and a table of cases cited is added.

There is a vast deal of labor in the collection of cases in the notes, but it would be impossible for one who had not used the book in practice to judge of its value. The statement of the American law is so entirely in the nature of brief abstracts that it does not call for notice.

B. L. H.

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TABLES FOR ASCERTAINING THE PRESENT VALUE OF VESTED AND CONTINGENT RIGHTS OF DOWER, CURTESY, ANNUITIES, ETC. Based chiefly upon the Carlisle Table of Mortality. Computed and compiled by Florian Graue, and Henry B. McClure. Cincinnati: Robert Clarke & Co. 1894. 8vo. pp. ix. 200. \$3.00.

The authors give in their preface an account of their care in procuring accuracy of computation and of type, such as is necessary in a work like this. The accuracy of their book can be satisfactorily tested only by use, but in other respects it seems to be a simple, handy, and inexpensive set of tables.

R. W. H.

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## DIVISIONS OF LAW.

IT is not possible to make any clear-cut division of the subject-matter of legal rules. The same facts are often the subject of two or more distinct rules, and give rise at the same time to distinct and different sets of duties and rights. The divisions of law, as we are in the habit of elliptically naming them, are in truth divisions not of facts but of rules; or, if we like to say so, of the legal aspects of facts. Legal rules are the lawyer's measures for reducing the world of human action to manageable items, and singling out what has to be dealt with for the time being, in the same way as number and numerical standards enable us to reduce the continuous and ever-changing world of matter and motion to portions which can be considered apart. Thus rules of law can no more give us a classification of human acts or affairs than the rules of arithmetic can give us a classification of numerable things. In scholastic terms, the divisions of law are not material but formal. Practising lawyers do not concern themselves much with divisions of a high order of generality. They have to think, in the first place, of speedy and convenient reference, and the working arrangements of professional literature are made accordingly. So the types in a printing-office are arranged not in order to illustrate the relations of spoken sounds or the history of the alphabet, but so that the compositor may lay his hand most readily on the letters which are oftenest wanted. Ambitious writers have sometimes gone to work as if it were possible to reduce the whole contents of a legal system



to a sort of classified catalogue where there would be no repetitions or cross references, and the classification would explain itself. Ambition on that scale is destined to disappointment by the nature of things.

Some general divisions in the science of law have been made classical by the method adopted in the Institutes of Justinian, and by the subsequent development given to the Roman ideas by commentators and modern jurists. One such division, which has been explicitly prominent only in recent times, is now commonly marked by the terms *in rem* and *in personam*. Some duties and rights consist in a claim of one certain person upon another; the duty and the correlated right are alike determinate. In these cases the duties and rights are said by modern writers to be *in personam*. Other duties and rights do not import any such definite correlation. When we put ourselves in the position of duty, we find no certain person having the right; when we put ourselves in the position of right, we find no certain person owing the duty. These impersonal rights and duties, regarding all one's fellow-subjects or a class of them, are said to be *in rem*. We have already seen something of this in endeavoring to fix the conception of legal right. The reason why we cannot well use the English adjectives "real" and "personal" for this purpose is that they are already appropriated to special technical uses with which this would clash. It would be free from objection, however, to speak of personal and impersonal duties or rights.

The most obvious and typical example of an event creating rights *in personam* is a contract. John and Peter agree that John shall sell his house to Peter on certain terms. This gives John and Peter certain rights against each other; they are bound to each other by a tie of mutual claims existing between them and between them only. This definite relation of claim and duty was called an *obligation* by the Roman lawyer, and is still so called everywhere, save that in English-speaking countries an unfortunate habit has arisen of using "obligation" in a lax manner as co-extensive with duties of every kind.<sup>1</sup> Now let Peter pay John the purchase money, and John do all proper acts for completing the sale. Suppose, to simplify the illustration, that John has re-

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<sup>1</sup> In English law the word formerly had a much more restricted meaning; namely, the special kind of contract also called a bond. But the English name "bond" is now always or almost always used for this, and it is convenient to restore "obligation" to its Roman sense, for which there is no synonym.

ceived the money in coin, and Peter has entered into the house and occupies it. Peter is owner of the house, and John and all other persons are under the duty of respecting his rights as owner, that is, of abstaining from trespass and the like. The money is John's, and Peter and all other persons must respect John's ownership of the money by not stealing it or otherwise meddling with it in any unauthorized way. These rights have no determinate corresponding duties, only the general duty of all men not to trespass, steal, and so forth. That duty in turn is not correlated to Peter's or John's rights more than to those of any other owner. *Dominium* is the Roman term for the rights of an owner against all the world: and the contrast of *dominium* and *obligatio* is the nearest approach that can be made, in classical Roman language, to the distinction marked by the modern terms *in rem* and *in personam*.

Let us now take a further step. Robert, a stranger, wantonly, or out of spite, breaks a window in Peter's house. He has disregarded the general duty of respecting other men's property, and he incurs a new duty, that of making compensation to Peter. It may be that he is also liable to fine or imprisonment for the disturbance of public order involved in his wrongful act, but that is a distinct and different matter. On the other side Peter has a personal and determined right against Robert. A legal bond of liability and claim has been created; that is to say, there is an obligation. If Peter comes out of the house at the moment when Robert breaks the window, loses his temper, and knocks down Robert, he has in turn broken in Robert's person the general duty of not assaulting one's fellow-subjects: for the right of action he has acquired against Robert is a right to redress by lawful means only, of which means knocking down the wrong-doer on the spot is not one in this case. Robert may not be held entitled to much compensation, but he is entitled to some. Here is yet another obligation, the liability being on Peter and the claim with Robert; and it results from a breach of the most general kind of duty, a duty corresponding to a so-called "primitive" right.

Obligation does not, however, include the whole of duties and rights *in personam*. There are personal relations recognized by law and having important legal consequences, but outside the legal conception of obligation. Peter, let us assume, lives in the house with his wife Joan, and they have children. Peter and Joan owe duties to each other which they cannot owe to any one else; and the same may be said (omitting minor distinctions in this place) of the duties

existing between Peter and his children. But these duties are not reckoned as obligations: for they cannot be expressed as definite claims, and their performance cannot be reduced to any definite measure. They are fully discharged only when the relation out of which they arise has come to an end: in the case of marriage by death, or, in systems of law where divorce is allowed, by divorce. In the case of parental relations, the normal mode of determination is the attainment of full age by the child (which, however, often has not that effect in archaic systems, and had not in the classical Roman law); to which many systems add marriage in the case of daughters, and adoption.

Relations of this kind, moreover, are intimately associated with moral duties which are not capable of legal definition and perhaps not of precise definition at all. Lying thus on the borderland of morality and law, they give rise in law to duties and rights which resemble obligations in being personal, but differ from obligations, and resemble duties and rights *in rem*, in not being capable of exhaustion by definite assignable acts, or by any number of such acts. The resulting duties are determinate as to persons, but not determinate as to contents.

Duties which are impersonal or *in rem* answer, as we have seen, partly to particular and acquired rights of other persons, such as owners, partly to the so-called primitive rights which are universal. They may be duties to all one's fellow-subjects or only to some of them.

Impersonal duties and rights are always attached by rules of law to some condition or state of facts. Whether the conditions are to any extent under the control of the parties or not, the legal consequences are what the law declares them to be. By the mere fact of being a citizen or subject one is entitled to a certain measure of personal security, freedom to follow one's lawful calling, and so forth. By the fact of becoming an owner one acquires the rights and faculties of an owner, such as the law declares them to be. One may choose to avail oneself of them or not, but one cannot alter them. If one could, one would be able to impose new duties on one's fellow-citizens without their consent, in fact, to make new law for one's own benefit. But this would contradict the fundamental purpose of law and justice. It is exactly what they aim at preventing.

Personal duties and rights, on the other hand, may not only arise from acts of the parties, but be directly created and deter-



mined by their will. The parties to an agreement not only confer and assume duties by their voluntary act, but by the same act prescribe what the duties shall be.

The same remark applies to transactions involving agreement and obligation, though not usually included under the name of contract, such as the creation of trusts in English law. The parties can make a law for themselves just because their dispositions are personal to themselves and do not impose or affect to impose any new duties on their fellow-subjects at large.

Personal duties are also prescribed by rules of law attached to acts or relations of parties. Sometimes they are contemplated by the parties, though not within their control, and sometimes not. Thus in the case of marriage and other family relations the legal consequences are contemplated and accepted, but cannot be framed and varied at the will of the parties, like the duties created by a commercial contract.<sup>1</sup> In many cases where duties resembling those created by contract are imposed by law (where, in Roman terms, there is obligation *quasi ex contractu*), they are such as it is considered that a just man, on being fully informed of the facts, would in the circumstances willingly assume. The most familiar example in this kind is the duty of returning a payment made by mistake.

Where obligation arises from a merely wrongful act, the liability is of course not desired by the wrong-doer, and is contemplated, if at all, as an evil (from his point of view) to be endured only so far as it cannot be avoided.

We have not yet mentioned another way in which personal duties and liabilities arise, namely, from the breach of antecedent personal duties created by agreement.

Every such breach of duty is in some sense wrongful; and it is contrary to the original intention of the parties. Agreements are made in order to be performed, not to be broken. It is even possible to regard the breach of a promise as a wrong in the strictest sense, a trespass or deceit.<sup>2</sup> Still, there is a good deal of difference. Duties under agreement may easily be broken without any wrongful intention. Performance may be prevented by misadventure (which is not always an excuse even if the party

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<sup>1</sup> This does not apply to incidental dispositions of property such as are made by marriage settlements. These may well be treated, as in our law they are, as matters of agreement largely within the control of the parties.

<sup>2</sup> This is fully exemplified in the history of the common law.

be not in fault), or there may be honest and serious diversity of opinion as to what is really due. Then, although parties do not desire their agreements to be broken, it would be incorrect to say that they never contemplate it; for they often make special provision for such an event, and even fix beforehand the amount or scale of the compensation to be paid. Thus it appears that the duty of compensation in case of non-performance is fairly regarded as incident and supplementary to the primary duty of performance. In practice and practical exposition it would not be convenient, indeed it would hardly be possible, to separate the legal results of breach of contract from the rules determining what are the duties and rights of the parties before any breach.

From the point of view of a modern lawyer conversant with modern habits of life and business it may well seem that the distinction between duties and rights prescribed by the parties themselves, and those prescribed by the law, is really of greater importance than that which looks only to their impersonal or personal character. The relations recognized by law can be divided, with no great apparent inequality as to quantity or value in human affairs, into those which arise from contract (or voluntary dispositions analogous to contract) and those which are independent of contract. And the distinction is at first sight so clear as to seem unmistakable. But the history of the law shows us that an absolutely clear-cut division is not to be had, even so, between the facts and relations to which our rules apply. The description of legal duties and rights as being *in rem* or *in personam* is usually and correctly said to be unauthorized by classical Latin usage. Roman lawyers spoke of "actiones," not "jura," being *in rem* or *in personam*. But it should be remembered that in Roman usage "action" included what we now call a "right of action," any determinate claim to some form of legal redress. "Action" was defined as a man's right of obtaining by process of law what is due to him, not as the process itself. "Nihil aliud est actio quam jus quod sibi debeatur iudicio persequendi."<sup>1</sup> Hence the modern usage is not so wide apart from the Roman as it appears at first sight to be.

A classical division accepted by almost all systematic writers is that of public and private law. No rule of law can be said, in the last resort, to exist merely for the benefit of the State or merely for the benefit of the individual. But some departments of legal rules

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<sup>1</sup> Celsus, D. 44. 7. De Obl et Act. 51.

have regard in the first instance to the protection and interests of the commonwealth, others to those of its individual members.

In the former case the public interest is immediate ; it can be directly represented by the proper officers of the State, and vindicated by them in the name of the State, or of its titular head : in the latter the interest of the individuals whose rights are affected comes in the first line ; it is protected by the law, but the parties interested are left to set the law in motion. Rules of private law may be said to have remained in a stage where all rules of law probably were in remote times : that is to say, the State provides judgment and justice, but only on the request and action of the individual citizen ; those who desire judgment must come and ask for it. Accordingly, the special field of such rules is that part of human affairs in which individual interests predominate and are likely to be asserted on the whole with sufficient vigor, and moreover no public harm is an obvious or necessary consequence of parties not caring to assert their rights in particular cases. In the law of contract and its various commercial developments these conditions are most fully satisfied ; though even here considerations of " public policy," to use the accustomed English term, are by no means absent. In the law of family relations and of property motives of legitimate private interest have a considerable part, but they are not so uniformly operative that they can be treated as adequately guarding the interest of the commonwealth. Hence, we find that theft and certain other forms of misappropriation and fraud, and even certain kinds of breach of contract, are punishable as public offences. The general security of property has to be considered as well as the chances of restitution in each case, which often are so slender that the person robbed or defrauded has no sufficient motive of self-interest for vindicating the law. When we come to bodily safety, public interest balances, or in some cases even outweighs the private. Wrongs of violence are in all civilized legal systems dealt with as offences against the commonwealth, in addition to the rights to redress which may be conferred on the individual injured. Wrongs which are personal but not bodily—such as defamation—afford a kind of neutral ground where the rights of the State and of individuals have about equally free play in modern law.

There fall more specially under rules of public law the duties and powers of different authorities in the State, making up what is usually known as the law of the Constitution ; also the special bodies



of law governing the armed forces of the State, and the administration of its other departments; laws regulating particular trades and undertakings in the interest of public health or safety; and, in short, all State enterprise and all active interference of the State with the enterprises of private men. We say active interference. For there are many dispositions in particular departments of private law which are founded on reasons of public policy, but are left for the parties who may profit or be relieved by them to bring to the notice of the courts. Of this kind are certain special restrictions on freedom of contract. In countries under the common law the State does not interfere of its own motion to prevent an agreement from being enforced on the ground that it is "in restraint of trade." On the other hand, there are many legislative enactments which expressly or by necessary implication forbid certain kinds of contracts to be made. Such enactments appear to belong to public law, though it is often convenient or necessary to consider them in connection with the rules of private law whose usual operation is excluded or limited by them.

To public law, too, belong all the minor penal enactments incident to constitutional and departmental legislation. But public law does not even here hold the field alone, for the same legislation which creates new public duties and imposes penalties may well, under specified conditions, also confer new rights to redress on individuals either expressly or as a consequence of principles recognized by the courts. The extent and effect of any such principles cannot be laid down beforehand: it depends on the forms, methods, and history of the particular system of law which is being administered. In our law the violation of a public duty may often give a right of action to a citizen who has thereby suffered damage, but this is by no means a universal or necessary result.<sup>1</sup>

It will be seen, therefore, that the topics of Public and Private Law are by no means mutually exclusive. On the contrary, their application overlaps with regard to a large proportion or the whole mass of acts and events capable of having legal consequences.

Sometimes the distinction between public and private law is made to turn on the State being or not being a party to the act or proceeding which is being considered. Only dealings between subject and subject, it is said, form the province of private law. But this does not seem quite exact; unless, indeed, we

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<sup>1</sup> *Ward v. Hobbs* (1878), 4 App. Cas. 13.

adopt the view, which has already been rejected,<sup>1</sup> that the State is wholly above law and legal justice, and neither duties nor rights can properly be ascribed to it. Many valuable things, both immovable and movable, are held and employed for the public service, — palaces, museums, public offices, fortifications, ships of war, and others; in some countries railways and all the various furniture and appurtenances of these. Whether they are held in the name of the State itself, or of the Head of the State, or of individual officers of the State or persons acting by their direction, is a matter of detail which must depend on the laws and usages of every State, and may be determined by highly technical reasons. In substance the State is and must be, in every civilized community, a great owner of almost every kind of object. Now the rights attaching to the State in this respect, or to the nominal owners who hold on the State's behalf, need not differ from those of any private owner, and in English-speaking countries they do not. They can be and are dealt with by the ordinary courts in the same way as the rights of any citizen, and according to the ordinary rules of the law of property for the preservation and management of the kind of property which may be in question. Again, many persons have to be employed, and agreements to be made with them; and these transactions are judged, so far as necessary, by the ordinary rules of the law of contract. Now the rules mentioned not only belong to private law, but are at its centre; they are the most obvious examples of what private law includes. It would be strange to say that they become rules of public law because the property and undertakings in question are public. The true view seems to be that the State, as an owner and otherwise, can make use of the rules of private law, and become as it were a citizen for the nonce, though ultimately for public purposes.

Sometimes the Law of Nations is brought under the head of Public Law; this is plausible according to the test of the State being a party, which, however, we have not accepted. It is enough to say here that the duties of independent States to one another, whatever may be the extent of their analogy to legal duties, are not legal duties or the subject of legal rules in the sense now under consideration. On the other hand, there is in modern law a body of principles and rules by which the courts are guided in deciding,

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<sup>1</sup> In an earlier chapter of the work in preparation of which this is a part.

on occasion, how far they are bound to take notice and make application of rules belonging to foreign systems of law; as where different stages of a transaction have taken place in different jurisdictions. These rules apply largely to matters of private law, and the principles are not confined to any particular local system. Differences of opinion exist among the learned, and the opinions of different writers or schools may prevail with the tribunals of different countries; but it is recognized on all hands that uniformity is desirable and is to be aimed at as far as possible. Hence the sum of such rules is now commonly called Private International Law. This term has been much discussed, and by some competent persons vehemently disapproved;<sup>1</sup> but it would not be to the present purpose to enter upon the controversy, which assumes an advanced knowledge of law. What is here sought is merely to make a common modern term intelligible.

Another classical division adopted by the Institutes of Justinian from Gaius is that which treats the whole body of law (that is, legal rules) as relating either to Persons, Things, or Actions.<sup>2</sup> "*Omne autem jus quo utimur vel ad personas pertinet vel ad res vel ad actiones.*"

To a certain extent this division coincides with the division already noted of Substantive and Adjective law. The law of Actions is the body of rules determining the modes and processes of legal redress; it is equivalent to what modern writers call the law of Procedure, but with some additions of the law of Remedies; for, as pointed out above, the Romans hardly distinguished the right to a certain kind of redress from the process of obtaining it. So far there is nothing calling for fresh explanation. It is to be remembered, however, that, as Maine has pointed out, the distinction of substantive from adjective law must in ancient times have involved a much higher effort of abstraction than we can easily realize now. When we consider the further division of substantive law into law of Persons and law of Things, we are struck by the fact that the division, though not in terms confined to private law, has in fact been so confined by the usage of both ancient and modern expounders. It will appear shortly that there is good reason for this.

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<sup>1</sup> See Holland, *Jurisprudence*, ch. 18. Some of the objections would be removed by substituting "Law of Nations" for "International Law."

<sup>2</sup> Cp. Maine, *Early Law and Custom*, ch. 11, and Dr. Moyle's introduction to the *First Book of the Institutes*.



Like the other divisions we have been considering, this is a division of legal rules, not of the facts to which they apply. It seems to be closely related to the practical questions which arise or may arise when a man feels aggrieved and thinks of seeking redress. Persons between whom there is a dispute; a thing which is the subject of dispute; some form of action for resolving the dispute by process of law: these are the common elements of litigation between parties. This evidently does not apply to crimes, or to all private wrongs; but the application is quite wide enough to support a classification which in truth is only a rough one. Do the persons concerned fall under any rules of law limiting or specially modifying their capacity or liability? What rights are recognized by law with regard to the subject-matter in question? Can it be owned, or exclusively enjoyed? One of the parties, perhaps, claims by sale or bequest; could the thing be given by will? could the sale invest him with the rights he claims to exercise? What, on the whole, is the resulting duty or liability? Then, supposing the rights of the parties to be settled, what are the available remedies? What is the active form, so to speak, of the legal result? Or in English legal phrase, what is the cause of action? Can compensation be recovered in money, or is there any other and what form of redress?

The distinction between law relating to persons and law relating to things may seem to the modern reader, perhaps, not to be a real one, or not one of the first importance. For things (whatever we include in the conception of a thing,<sup>1</sup> which we are not yet considering) can plainly have no place in legal rules except in connection with the duties and rights of persons. The material world, as such, is absolutely irrelevant to jurisprudence. Every rule of law must to this extent have to do with persons. And in modern Western law we find that one person is very like another, and differences between persons tend to be reduced to a minimum. In fact we can nowadays be tempted to regard the law of persons as identical with the law of family relations, in which the irreducible differences of persons, as we may call them, resulting from the conditions of sex and age, are of necessity most prominent. But in archaic societies it is not at all to be assumed that persons are alike. Nowadays we presume every man to have the full legal rights of a citizen in the absence of apparent reason to the contrary. If any man is not capable of buying and selling, suing and being

<sup>1</sup> See my paper "What is a Thing?" in the *Law Quarterly Review* for October, 1894, X. 318.

sued, in his own name and on his own responsibility there must be something exceptional about him. Undischarged bankrupts, for example, are not a very large proportion of our adult population. But at Rome in the time of Cicero, or even of the Antonines, a prudent man could not presume anything about a stranger's legal capacities. A person of respectable appearance who spoke Latin was not necessarily even free. We know that serious doubt whether a man was free or not was quite possible. If he was a slave, he had no legal rights; he was not a person at all in the eye of the law. If he was free, he might still be a freedman, or a foreigner (not to speak of minuter distinctions). If he was a Roman citizen he might still have a father living, and be under that father's power; again, he might have been emancipated or adopted. He might belong in short to any one of several conditions of men, each having its distinct and proper measure of legal capacities. For a Roman of the Republic, and even of the Empire down to Justinian's time and later, the question, "With what kind of person have I to do?" had a very clear and prominent legal meaning, and no question could be more practical.

Modern authors have not arrived at any general agreement either as to the precise meaning of the law relating to persons in the Roman classification (if indeed the meaning ever was precise), or as to what topics are conveniently included under such a head at the present day. There is, however, a general tendency to regard the law of persons as supplementary to the general body of legal rules. We are apt to ask first, not what are the respective capacities of the parties in the matter in hand, but what are the rights of the matter assuming all parties to be of full ability. Then we consider, as a possible accident in the case, whether anyone is under any disability, or to any extent exempt from responsibility, by reason of some special personal condition. In books meant for practical use this method is commonly followed, the disabilities and immunities of infants, married women, and so forth, being explained with reference to the department of law or class of transactions which is the subject of exposition.

Another principle of division frankly based on convenience of exposition is that by which, in dealing either with a whole body of law or with a substantial department thereof, those principles and rules which are found in all or most portions of the subject, so that they may be said to run through it, are disposed of before the several branches are entered upon. Such principles and rules may relate to the nature of duties and rights in themselves, to the con-

dition of their origin, transmission, and extinction (*title*, as we have already used the word <sup>1</sup>), or to the remedies applicable. The setting forth of these matters in advance, so as to avoid repetitions and awkward digressions in the subsequent detailed treatment, is called, after the modern German usage, the General Part of the work in hand. In the Special Part the several topics are dealt with in order, and, the general principles having already been stated, only those rules are discussed which are peculiar to the subdivision in hand, or are in some peculiar way modified in their application to its contents. Thus Savigny's great work on Roman law is only the "General Part" of his projected system. Well framed legislative acts on large subjects usually proceed in some such manner from the general to the special, — thus the Indian Penal Code has chapters of "General Explanations," "Punishments," and "General Exceptions" (that is, the causes for which acts, otherwise criminal, are justified or excused), which come before the definitions of particular offences. The "preliminary" part of Sir James Stephen's Digest of the (English) Criminal Law is a well marked General Part. Again the first six chapters of the Indian Contract Act contain what a Continental writer would call the General Part of the law of contract; namely, rules of law by which the formation, validity, and effect of all kinds of contracts alike are governed in British India. The other chapters, which deal with sale, agency, and other species of contracts, might be called the Special Part of the Act. Notwithstanding the obvious advantages of this method, it has only gradually and of late years come into use among English lawyers, — I do not say in name, which is of little moment, — but in substance. The late Mr. Leake's excellent and accurate "Digest of the Principles of the Law of Contracts" is, however, a complete and systematic General Part for that subject. Where a wide field has to be covered, the method may well be applied on a smaller scale to subdivisions within the general scheme. It is hardly needful to remark that it is by no means necessarily confined to legal exposition; but it is specially appropriate for legal writings, including legislation, by reason of the number of technical ideas and rules of various degrees of generality which, in working out any topic, have to be constantly assumed as within the reader's knowledge.

*Frederick Pollock.*

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<sup>1</sup> In a preceding Chapter.



## THE TRIPARTITE DIVISION OF TORTS.

THE essay in this REVIEW (May, 1894), by Mr. Justice HOLMES, on "Privilege, Malice, and Intent," raises a broad question as to the general analysis of a Tort, which it is the purpose of this article to discuss. The writer has for some time believed in the correctness of the division there briefly expounded as a foundation for the discussion of Malice in connection with Interference with Social Relations, and the general interest shown in the suggestions of that learned writer seems to show that the time is favorable for a presentation of the analysis in its broader aspect as a general foundation for the treatment of all Torts. Certainly the subject is in need of some accepted analysis, which shall at once co-ordinate our present knowledge and form the basis of future development. If we are ever to have, as Sir Frederick Pollock puts it, not books about specific Torts, but books about Tort in general, some further examination of fundamental ideas is desirable.

One might proceed with such a general analysis without regard to the definition of a Tort, or—what is much the same thing—without setting forth one's view as to the differentiation of Tort-relations from others in the general classification of private law. But, for the sake of clearness, the latter task will here be briefly attempted, no effort being made to justify the system stated, or to say more than is necessary as preliminary to the main subject.

Private law, then, deals with the relations between members of the community regarded as being ultimately enforceable by the political power. Such a single relation may be termed a Nexus; it has a double aspect, for it is a Right at one end, and a Duty or Obligation at the other; every such relation or Nexus necessarily having both these aspects. In classifying them, we may of course rest the division on the nature of either the Rights involved or the Duties involved. For the first and broadest division it seems best to take the latter point of view, and to distinguish according as the Duty has inhered in the Obligor (1) without reference to his wish or assent, or (2) in consequence of some volition or intention of his to be clothed with it. The former we may term Irrecusable,—having reference to the immateriality of the attitude of the obligor in respect to consent or refusal; the latter,

Recusable,—for the same reason. The latter sort includes Contracts (in the narrow sense), and some few varieties not here important. The former includes Torts (so called), Enrichment (a part of Quasi-Contracts as now treated), and a few minor ones. The permanent justification for this division, it may be said, will be found in the deep-rooted instinct of the Anglo-American legal spirit, which is strikingly backward in imposing or enlarging an irrecusable nexus, but gives the freest scope for the voluntary assumption (Recusable) of nexus of any content.<sup>1</sup> Dividing further the former sort, we find (*a*) many imposed universally, *i. e.* on all other members of the community in favor of myself; and (*b*) a few imposed on particular classes of persons by reason of special circumstances. Of the latter sort the duty of a child to support a parent, as recognized in Continental and other law, is an example; but the most important group is found in parts at least of the subject known in Roman law as *Quasi-Contract*, in modern French and German jurisprudence as *enrichissement indu* and *Bereicherung*, and with us to-day as Quasi-Contract. As the feature which distinguishes this sort (*b*) from the former (*a*) is that the nexus is imposed in the one case on all persons whatever, but in the other on those particular persons only of whom special facts are true, the natural terms of distinction are, for the one, Universal Irrecusable Nexus; for the other, Particular Irrecusable Nexus. The subject of Tort, then, deals with the large group of relations here termed Universal Irrecusable Nexus. But the failure of the reader to accept the analysis thus briefly set forth need not prejudice the validity of what is now to be said, for it has been given only that the scope of the relations included by the writer under Torts may not be misunderstood.

The next question is, What is the content of the rights and duties included under this head? Here, of course, we get nothing from mere analysis; we must look to judicial practice and legislation, as embodying the established results of the community's sense of systematic justice. We have seen, however, that the starting-point of the analysis is the tendency of Anglo-American peoples to

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<sup>1</sup> Compare Holmes, "Common Law," 77: "The liabilities . . . arising from a tort are independent of any previous consent of the wrongdoer to bear the loss occasioned by his act. . . . He does a harm which he has never consented to bear, and if the law makes him pay for it, the reason for so doing must be found in some general view of the conduct which every one may fairly expect and demand from every other, whether that other has agreed to it or not."

be chary about imposing irrecusable duties, especially when universal. The general character, then, of these nexus will be that of relations fundamentally necessary to civilized social intercourse, — the minimum number of universal nexus without which (having reference to the points of view of both obligee and obligor) the community cannot get along. This in fact fairly expresses the general character of Tort-rights. Furthermore, and as a result of the same spirit, these Universal Irrecusable Nexus are all negative, not affirmative; *i. e.* the line is drawn at requiring others not to be the means of harm to me; our law has not yet gone so far, in Universal duties, as to impose any affirmative duty, as between one man and another, to take action to confer a good.

But, going further than these general features, we easily see, on examination, certain generic component elements in every relation of the sort we are considering. *First*, there are the specified sorts of harm which the obligor has a claim to be free from; this is the basis of the obligee's interest, the thing for the sake of which the nexus is instituted. *Second*, there must be something to connect the obligor with this harm, — that is, we must specify what is the sort of causality-connection, or the like, between the obligor and the harm in question for which he will be held responsible. This is necessary, because the very nature of the nexus presupposes that the obligor is to have some connection with the harm, and it is part of our business to specify when that connection shall be deemed to exist. *Third*, since human experience has always found it necessary to sanction in law the principle of give-and-take, and to compel us sometimes to put up with harm whose source is perfectly clear, there are numerous classes of circumstances to be specified in which the nexus fails, and is without application, — that is, although harm is done, and although there is no question as to a particular person's responsibility for it. These circumstances form limitations to the nexus as a whole.

There are, therefore, three distinct classes of limitations dealt with in the law relating to Torts, which may be conveniently termed the Primary, Secondary, and Tertiary limitations. The first class deals with the sort of harm to be recognized as the basis of the right; this may be called the Damage element. The second class deals with the circumstances fixing the connection of the obligor with this forbidden harm; this we may call the Responsibility element. The third class deals with the circumstances in which, assuming both the Damage and the Responsibility elements to be



present, the nexus still has no validity,—in other words, the considerations which allow the harm to be inflicted with impunity; this we may term the Excuse or Justification element. This analysis results in a tripartite division of the Tort-nexus.

We may now examine this division in detail with reference to the various topics dealt with in our law. No attempt will here be made (though a later occasion may be taken for this) to establish any further subdivisions within these three great groups. The object here is merely to illustrate and justify the above analysis by pointing out the place occupied within the above groups by the main topics recognized as belonging to the subject.<sup>1</sup>

I. *The Damage Element.*—The question is here, what sorts of harm is it that the law recognizes as the subject of a claim for its protection? We have here nothing to do with the question, Who is responsible? or, Is X responsible? nor with the question, Is X, though responsible, here excusable? We may and do determine the limitations of the Damage element without regard to these questions. Of course, after determining that the one exists, we may then determine that the other does not; and cases are frequent in which two or even all of the questions are disputable, and must be settled before a final determination can be reached as to the existence of a claim, *i. e.* a nexus. But, whenever there is a decision upon the Secondary or the Tertiary limitations, it necessarily involves, by assumption or otherwise, the sufficient existence of the other element or elements; nor can a claim be sanctioned by a favorable decision as to the Damage element without an assumption as to the existence of the other two.

Under the Damage element, of course, are to be considered

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<sup>1</sup> The language in which Mr. Justice Holmes, in the above mentioned article, seems to show a belief in the propriety of this tripartite division is as follows, the passages being somewhat curtailed:—

(1) "I should sum up the first part of the theory in a few words, as follows. Actions of tort are brought for temporal damage. The law recognizes temporal damage as an evil which its object is to prevent or to redress, so far as is consistent with paramount considerations to be mentioned." (2) "When it is shown that the defendant's act has had temporal damage to the plaintiff for its consequence, the next question is whether that consequence was one which the defendant might have foreseen." (3) "The first [next] question which presents itself is why the defendant is not liable without going further. The answer is suggested by the commonplace, that the intentional infliction of temporal damage, as the doing of an act manifestly likely to inflict such damage and inflicting it, is actionable if done without just cause. . . . There are various justifications. In these instances, the justification is that the defendant is privileged knowingly to inflict the damage complained of."

physical injuries, — what sort of physical or corporal harm may be the subject of a claim. Mere touching of the person may be, while mere touching of personal property once was not. Physical illness of course is. Whether nervous derangement may be, when not brought about through corporal violence, and whether mere fright, with or without corporal violence, may be, is still the subject of discussion. Forms of annoyance, such as disagreeable odors, sights, and sounds, are usually said to be the subject of recovery only in connection with the ownership of real property. There must in all such cases be a degree of inconvenience worth taking systematic notice of. The content of the right to land is also here concerned, including the right against mere intrusion upon the air space, against the cutting off of surface or subterranean water, etc. The nature of the harm known as Conversion must also be treated here. The social relations must be enumerated with which interference is forbidden, and the words known as Libel and the words deemed slanderous *per se* are to be discussed. The facts vesting the rights of patent and copyright, and the matters as to which we have a "right to privacy," and several other modes of harm, involve also some statement of the Damage element.

A good illustration of the necessity for distinguishing between the points of view of the Primary and the Secondary limitations is found in the current discussion of the right to recover for nervous illness, or for mere terror (without illness) caused without corporal violence. From the former point of view the question is whether such harm may be the subject of recovery at all; whether the elusive or temporary character of the harm makes it difficult or not worth while to consider it; whether the opportunity for simulation of illness, or for aggravation of it by the general effect of the imagination or by the particular weaknesses of individuals, does not warn us to be cautious in sanctioning such claims. It is apparent that from this point of view the result might be one for cases of positive nervous derangement, and another for mere temporary fright. But, assuming that such harm may be the subject of a recovery, we have still to consider each case from the point of view of the Responsibility element, *i. e.* to say whether this particular defendant should be made responsible for this particular injury under the circumstances (*e. g.* whether he was negligent or not); and it is apparent that we may still from this point of view deny the present plaintiff's right to recover against the present

defendant. We sometimes find cases indiscriminately marshalled by a writer as "for recovery" or "against recovery" in such cases, as if but a single question were involved. Yet the courts constantly do consider these different points of view. In *Victorian R. Com'rs v. Coultas* (13 App. Cas. 222), for instance, the court said:—

(1) "Damages [*sic?* damage] arising from mere sudden terror . . . occasioning a nervous or mental shock, cannot under such circumstances, their Lordships think, be considered a consequence which in the ordinary course of things would flow from the negligence of the gatekeeper."

(2) "If it were held that they can, . . . the difficulty . . . of determining whether they [the injuries] were caused by the negligent act would be greatly increased, and a wide field opened for imaginary claims."

Here are both points of view; and on both the plaintiff loses. Again, in *Phillips v. Dickerson* (85 Ill. 11), the court assumes without question that the sort of injury is a proper subject for recovery, and confines itself to the question of the Secondary limitations,

"Whether such a result was such a natural and proximate consequence of defendant's conduct as to make him liable therefor,"

and here also finds for the defendant. No discussion of the subject can be of value unless the two elements involved in the cases are carefully distinguished.

II. *The Responsibility Element.*—Assuming that the kinds of harm to be avoided or to be protected against have been determined, we have next to consider those limitations of the nexus which determine the nature of the Responsibility element, by defining what connection must exist between the obligor and the harm done, in order to bring him within the scope of the nexus. The question is, in a concrete case of the specified harm, what person, if any, shall be looked to as bound to bear legal responsibility for it.

This is not the place to attempt to define the order and nature of the topics that belong under his head. The doctrine of "acting at peril," the phrasing and application of the tests of "proximate cause," "reasonable and probable consequences,"—these, with their attendant refinements and exceptions, form the substance of the general topic. But the important circumstance to call attention to is that this topic has an application in the domain



of each one of the common so-called Torts, — conversion, defamation, loss of service, etc., — no less than in case and trespass. It has been customary to treat the subject of Negligence as if it were a specific injury by itself, instead of merely a question of Responsibility liable to arise in connection with various kinds of harm; but this obscures the true situation. Speaking roughly, a man may be made responsible for a given harm by initiatory action of one of three sorts: by acting (1) designedly, with reference to the harm; (2) negligently, with reference to it; (3) at peril, in putting his hand to some nearly related deed or some unlawful act. A part of the law is occupied with determining whether or not this last and strictest standard shall be applied; and when it is, no resort is needed to the second standard, negligence. Thus it happens that, as almost all direct dealing with personal property is done at peril, the question of negligence (or of knowledge) seldom arises in that connection. Yet it may arise;<sup>1</sup> and thus, even though the treatment of the Responsibility element — mainly negligence and acting at peril — under the head of Conversion is trifling in comparison with its place in injuries covered by trespass and trespass on the case, still it has its rightful place there as elsewhere.

Take, again, Libel. Two cases of recent occurrence will illustrate the part played by the Responsibility element. (1) The Trustees of the British Museum placed in the Library a book containing matter assumed to be libellous; the question arises whether they are responsible for its publication (in the technical sense) without knowledge of the presence of the libellous passage (*i. e.* whether they acted at peril) or are to be judged by some test of due care. (2) In Chicago, a young priest, Father Sherman, delivered a lecture, and in handing to the reporters his manuscript gave to them inadvertently a portion, not orally delivered, containing passages which we may assume to have been libellous. The question arises whether he acted at peril in writing and carrying about this libel, or is to be judged only by the test of due care. Take, also, loss of service and analogous injuries. The question is constantly likely to arise whether the consequences of certain conduct were such as a person of ordinary prudence ought to have foreseen. In *Vicars v. Wilcocks*,<sup>2</sup> Lord ELLENBOROUGH laid down a rule that special damage "must be the legal and natural conse-

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<sup>1</sup> *Wellington v. Wentworth*, 8 Metc. 548; *Nelson v. Whetmore*, 1 Rich. 318.

<sup>2</sup> 8 East, 1.

quence of the words spoken"; and afterwards in *Lynch v. Knight*,<sup>1</sup> this phrasing was doubted by Lord WENSLEYDALE, who preferred to say that "the consequence must be such as . . . might fairly and reasonably have been anticipated and feared would follow from the speaking the words." Here we have the same sort of question that arises so commonly for injuries to the person and the property.

The Responsibility element, then, in these and in other classes of injuries, has a real place, — greater or less, to be sure, in different instances, but scientifically never to be ignored. Responsibility must be discussed as a generic idea, and with reference to the various harms, and must be thus discussed just as well as the nature and limits of the harm itself.

III. *The Excuse or Justification Element.* — Assuming that the various sorts of harm have been specified, and that the conditions and tests of Responsibility for them have been determined, the general limitations under which the nexus exists still call for treatment. Perhaps the simplest illustration, if any is needed, is the excuse of Self-defence. Here it is conceded that a harm has been done, otherwise the subject of recovery, and that a definite person is responsible for it; nevertheless no legal claim exists, because social experience prescribes limits to the nexus, and one of those limits is found in the circumstances briefly expressed in the term "self-defence." Here, again, it is impossible now to attempt an analysis of the various kinds of limitations. Only two or three suggestions can be made.

I. As a rule certain principles of pleading are based on the distinction between this element and the first and second, throwing on the defendant the business of making out the existence and the application of these limitations. For instance, justifications for a battery and privileges for defamation are left to the defendant to urge. Sometimes, however, the principles of pleading cannot be relied upon to show in this way the line of distinction. For instance, in actions for malicious prosecution, these tertiary limitations vindicate or exempt the defendant, if he brought the suit upon reasonable or probable ground and without malice; nevertheless, it is the plaintiff who is required to show that this reason-

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<sup>1</sup> 9 H. L. C. 577. So also *Allsop v. Allsop*, 5 H. & N. 534, "damages . . . that do not fairly and naturally result"; *Davies v. Solomon*, L. R. 9 Q. B. 112, "reasonably and naturally be expected to follow."

able or probable ground did not exist,— a sensible requirement which we must not allow to obscure the true nature of this element.

2. The rejection or acceptance of the doctrine of *Fletcher v. Rylands* — the question whether the test of acting at peril or of due care under the circumstances shall be applied, a question of Responsibility — is sometimes confounded with the question whether one who has knowingly inflicted and continues to inflict a conceded harm is excusable because he is conducting his business in an ordinary and otherwise fair and reasonable manner. Thus, the question whether an electric-trolley railway is liable for electric interference with telephone wires is in part a question whether one party's convenience shall be subjected to another's, — a pure matter of justification or excuse, like the claim of a land-owner to divert or flow back surface water by improvements on his land, or the claim of a manufacturer to diffuse smoke or cause vibration with impunity. Yet the two questions have by no means been kept separate in current discussion.

3. Another application of the above distinction, similar but of larger moment, has been made by Mr. Justice HOLMES in this REVIEW in the article already referred to. He points out that the question of Malice, in connection with boycotts and similar interference with social relations, is not usually one of Responsibility, *i. e.* of the Secondary limitations, but of Excuse, *i. e.* of the Tertiary limitations. We have the case of an inquiry conceded to be a harm and of a party conceded to be the source of it, *i. e.* we have the Damage and the Responsibility elements satisfied; the problem is how to mark off the line of policy so as to determine where this harm may be inflicted with impunity. It is conceded that there are certain circumstances about which there is no doubt, *i. e.* the nexus or right-and-duty extends to cases where fraud, or defamation, or violence is employed, and it does not extend to cases where mere peaceable persuasion not amounting to coercion, and not effected by combination, is the means used. In the debatable ground, one tendency of opinion is to draw the line according as the interference is accompanied or not by malice, *i. e.* (perhaps) is gratuitous and uncalled for by personal needs. Whether this opinion be the best or not, Mr. Justice HOLMES has demonstrated that we have in it, none the less, merely another form of the Tertiary limitation, *i. e.* of a doctrine of Excuse, independent of any doctrine of Responsibility, — a demonstration highly important to the scientific discussion of the subject.



One or two general implications of the recognition of this tripartite division of Tort may now be pointed out.

1. It calls to our attention the necessity, every day drawing nearer, of adjusting the treatment of our substantive law to the abolition, already largely accomplished, of the forms of action and classes of writs in Tort. As regards the distinction between Case and Trespass, there are of course two or three important marks left by it on the substantive law; *e. g.* the principle (justifiable, probably, on the highest grounds) that, of injuries to the person and to property, a mere touching is actionable if produced directly by the defendant, but not actionable if produced indirectly; the doctrine (not positively established and probably not sound in principle) that the causing of terror at physical danger is actionable when occasioned directly, but not actionable when occasioned indirectly. But the time must come when the sorts of actionable injuries will be classed according to an analysis of the essential qualities of the injuries, not the kind of writ employed by the clerks of the Chancery nor the analogies peculiar to a primitive legal condition; a time when further development can take place along these natural lines of classification and in view of the policy that may be appropriate to each situation. The recognition of the common Damage element in all Torts, and its separate treatment, will do much towards this end,—in fact, necessarily involves it as an ultimate consequence. By this it is not meant to advocate a slighting of the forms of action and their historical development, either in treatises or in education. For the present generation at least this would be impossible, as well as unpractical in the highest degree. But there is no reason why we may not, so far as may be, recognize legal realities and put ourselves in the path of more scientific treatment.

2. A more important consequence of the recognition of the tripartite division is the helpful results to be reached by studying the different solutions of the same problems and the applications of the same principles in different torts. Clearer understanding of a general principle and its differing aspects in application, keener appreciation of its worth or perhaps of its incongruities, greater readiness for new developments already pressing upon us,—these are the benefits of such a recognition. It is perhaps in the Secondary limitations—the Responsibility element—that the most interesting opportunity offers; and yet in the Tertiary limitations it is impossible to expect any general analysis or scientific treatment of the various kinds of Excuses or Justifications without first recognizing

the common element and differentiating its field from the others. Of course more writers than one have recognized the propriety of treating "Justifications" under one head; but they have regarded them as more or less appurtenant to specific injuries, instead of looking for whatever common element there might be and analyzing them with reference to each other as well as to the different injuries associated with them. The article by Mr. Justice HOLMES suggests the practical usefulness of work in this direction.

It has not been possible in the allotted space to explain difficult points, or to anticipate questions and criticisms naturally raised by the subject. What has been written will serve, perhaps, as a suggestion for those who have come to believe that there is still room for a theory of the law of Torts which shall, in a greater degree than now, be built up inductively from the cases themselves and yet bear a scientific form.

No opinion is expressed, it should be added, as to whether it is possible or desirable to teach the law of Torts to-day according to the above grouping.

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## REMOTENESS OF CHARITABLE GIFTS ONCE MORE.

### I.

THE question whether property can be transferred beyond certain periods, in a certain event, from one charity to another charity, does not in itself seem to be of very great interest. If the people permit a charitable gift to be exempted from the operation of the rule against remoteness, if the property of charity is not subject to the usual limitations which public policy has placed upon the property of the individual, if it is as it were withdrawn from the avenues of trade by the charitable gift, what difference does it make to the public whether or not the property passes, in a certain event, from charity to charity, indefinitely? Hence it seems as if the question, in these busy times, was not really of much moment; but I am sure this is not the case, and I feel under no obligation to crave the forbearance of my readers in bringing this subject to their attention once more. That it needs no apologetic introduction is apparent from the decision in *In re Tyler*,<sup>1</sup> where the Court of Appeals felt bound by *Christ's Hospital v. Granger* to hold valid the following disposal of property: £42,000 to the London Missionary Society, committing to the said society the keys of the family vault, the same to be kept in good repair; "failing to comply with this request, the money left to go to the Blue Coat School." Upon this decision Professor Gray comments as follows: "Yet see to what this leads. A. gives \$200,000 to Harvard College, on condition that, on the first day of January in each year, it pays \$5,000 to the then heir of the body of A., and if it fails to do so, then the fund to go to Yale College. The gift over to Yale College is, according to *Christ's Hospital v. Granger* and *In re Tyler*, perfectly good; and so long as not charged on any particular fund, there is nothing illegal in paying \$5,000 to the heir of the body of A. on the first day of January. But is not such an arrangement against public policy? Which is the sounder view of the Rule against Perpetui-

<sup>1</sup> 3 Ch. 252.



ties, — that which condemns or which sanctions such a scheme? ” Professor Gray condemns the construction which supports *Christ’s Hospital v. Granger* and *In re Tyler*, whilst I find that Mr. Jabez Fox sanctions it.

In the sixth volume of the HARVARD LAW REVIEW, page 195, Mr. Fox thinks: —

The Rule against Perpetuities is only aimed at preventing the non-alienation of property.

In the seventh volume of the same REVIEW, page 406, Professor Gray, on the contrary, says: —

The true object of the rule is to restrain the creation of future conditional interests.

In other words, Mr. Fox is of the opinion that the rule does not apply to inalienable interests, whilst Professor Gray feels quite confident that it does so apply. The issue here is clearly defined, and it ought not to be difficult to determine who is right.

Professor Gray cites Vice-Chancellor Stuart, in *Avern v. Lloyd*,<sup>1</sup> and Mr. Justice Fry in *Birmingham Coal Co. v. Cartwright*,<sup>2</sup> as rendering decisions which support Mr. Fox; but he adds, that “these two cases are instances where two exceptionally able judges have been misled by the incomplete form in which former courts had declared a doctrine, and in consequence making decisions which had to be overruled,” the first *in terms*, in *In re Hargreaves*,<sup>3</sup> and the second *expressly*, in *London & S. W. R. R. Co. v. Gomm*.<sup>4</sup>

The question upon which Mr. Fox and Professor Gray have very courteously “agreed to disagree,” is involved in a gift to charity, that is, Is the true doctrine in the Rule against Perpetuities set forth in *Christ’s Hospital v. Granger*?<sup>5</sup> In this case, Lord Cottenham held that a limitation over from one charity to another charity is good, without regard to its remoteness. He said: “These rules are to prevent property from being ‘inalienable’ beyond a certain period,” and that this effect is not produced by the transfer, in a certain event, of property from one charity to another. Mr. Fox thinks that Lord Cottenham used the word “inalienable” in its narrowest possible sense, and hence Mr. Fox is enabled, very naturally, to deduce the following as the true province of the rule: to prevent property from being so disposed of that it cannot,

<sup>1</sup> L. R. 5 Eq. 383.

<sup>2</sup> 11 Ch. D. 421.

<sup>3</sup> 43 Ch. D. 401.

<sup>4</sup> 20 Ch. D. 562.

<sup>5</sup> 1 McN. & G. 460.

within a certain period, be conveyed by a good title. But I cannot think it possible that Lord Cottenham used the word "inalienable" in such a narrow way, thus confining the rule within such meagre limits, rendering it of little practical value, and defeating what seems to me its *raison d'être*. It is true, of course, the rule incidentally does prevent property being rendered "inalienable," but this it accomplishes simply through the fact that, were it not for the rule, remote future interests could be created, but, as these interests cannot be created, the property must be "alienable" within the limits of the rule.

The right of alienation is, of course, involved, if the right is understood to mean that the one having the present interest has the power to exercise the right, and to do as he may see fit with the proceeds. The one object of the rule is, of course, to prevent the *tying up of property*, to use Mr. Fox's words, and I can quite agree with him if by "tying up" Mr. Fox means the property cannot be alienated and the proceeds disposed of in any way it may be desired by those having a present interest within the limits of the rule. Mr. Fox does not mean this, — if he does, he agrees with Professor Gray. It seems to me that in not one of Mr. Fox's cited cases is the question of the right of alienation directly involved. The words "perpetuity" and "inalienable" were considered from the standpoint of a postponement of a vested interest: it is a perpetuity unless it vests absolutely within the limits of the rule; it is a perpetuity unless there is a vested interest which can alienate absolutely, within the limits of the rule. Of course, giving property in perpetuity, *in perpetuum*, is giving it forever, and if property is given forever it cannot be "alienated" from that purpose. Now, the rule is to prevent a "perpetuity" in the sense of the giving of property to one object or purpose forever; the rule is also to prevent the making of an "inalienable" gift; for a gift if a perpetuity is "inalienable," and if "inalienable" it is a "perpetuity."

I have always thought, and Mr. Fox's citations have strengthened my opinion, that the rule was intended to subserve the public policy of fixing a limit beyond which one's disposal of one's property shall cease; in other words, public policy intends that after a certain time one's property shall not be tied up, — that it must pass free and untrammelled to some one who can employ it in any way this some one may choose; if property can be tied up beyond the limits fixed by the rule, it would be a colossal check

upon progress and enterprise. In short, there must be a fee interest in some one within a certain fixed time. Of course, an estate tail, or any destructible estate, is not bad. Clearly, Lord Cottenham used the word "inalienable" in this broader sense. The ability to make title to property — technically, to alienate — is a very different thing. As said in *Winsor v. Mills*,<sup>1</sup> "The possibility of obtaining releases is not the test by which to determine the validity or invalidity of a limitation," and with this I am quite sure Lord Cottenham would have agreed.

It seems clear to me that Lord Cottenham, when he said, "These rules are to prevent property from being inalienable beyond a certain period," was reasoning in this way: a charitable gift is in itself a perpetuity, being a gift *in perpetuum*; it therefore, of course, renders the subject of the gift "inalienable." Now, as this effect of *inalienability* is produced by the gift itself, the rule is not involved, because the rule is intended to prevent that which a gift to a charity permits; or, again, the property is already "inalienable" by the fact of its being given to charity; therefore the rule cannot apply, for if it did, there could be no such thing as a gift to charity. Reasoning in this way, he very readily might have said, "These rules are to prevent property from being 'inalienable' beyond a certain period."

Surely the fact that the charity may not alienate the subject of the gift is not the important characteristic of a charitable gift, using the word "alienate" in its strict technical sense; on the contrary, is it not rather the fact, that by reason of the public good charity is permitted to hold property *in perpetuum*? Charity may be the permanent and final beneficiary of a gift; the property may be literally given to it forever. A charity is the only object of which this may be said; one cannot provide for a complete and perfect disposal of property forever, save by giving it to charity. Now, is not this quality of the gift its chief characteristic, and is it not fair to assume that Lord Cottenham, when thinking of a charitable gift, was recalling this highest attribute of it, and that he used the word "inalienable" whilst recalling the fact that there was no future disposal of the property, for it was given to charity forever? It was "inalienable" not *necessarily* in the sense that the charity could not make a good title, but rather in the sense that the fund, or the property, or the proceeds of the property,

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<sup>1</sup> 157 Mass. 362, 365, 366.



must always be held for the charitable purposes. The charity ownership was qualified; it could never deal with the property as an individual owner in fee could deal with his own property, hence in this higher sense the property was "inalienable." In a gift of \$100,000 of personal property to charity, whether in money, in stock, or in bond, cannot the charity dispose of (alienate) the bond or stock, and make a good title thereto? but, on the contrary, is it not the chief characteristic of this gift that the money, stock, or bond is *still* an "inalienable" gift, in that it is given in perpetuity, and the charity cannot dispose of the fund in any way it may see fit? As for myself, I have not a doubt that, in speaking of a gift to charity, I could use, as Lord Cottenham used, the word "inalienable," and mean exactly what I have said above; and I feel quite sure, if my readers will only ask themselves the question, they will find that they too, very readily, could use the word in the way I think Lord Cottenham has done.

It seems absurd to me to make the rule depend on the possibility of being able to make a conveyance, and I cannot believe that Lord Cottenham understood the rule in any such way. He uses the word "inalienable," it may be, perhaps, carelessly, but he never meant to confine the word to its strict technical meaning; and this, I think, for the reason that *the mere lack of power of alienation, in the sense of the right to make title, is one of the minor characteristics of the rule*, whilst its chief characteristic consists in the lack of the power of alienation, in the sense of the right of complete disposal, whether the gift consists of money, stock, bond, or land.

## II.

Lord Cottenham, whilst using the word "inalienable," as I have just explained, and whilst perfectly familiar with the principle in the rule, yet, as frequently happens with all of us, has erred in applying the principle in *Christ's Hospital v. Granger*. I think it may be seen from his own words how he has been led astray: "If the Corporation of Reading might hold the property for certain charities in Reading, why may not the Corporation of London hold it for the Charity of Christ's Hospital in London?" And he thought it could, because the property is not rendered "inalienable" by the transfer, in a certain event, of property from one charity to another. He reasoned in this way: As a charity may be created to exist forever, so property may be given to it *in*

*perpetuity*; hence, in a charity an "alienable right," in the sense of a perfect ownership, can never exist; therefore the property is, as it were, out of the avenues of trade, and there is no reason why one charity may not succeed another. But this reasoning is not sound. Whilst it is true that a charity may never have an "alienable" right, in the sense of an absolute, unfettered ownership, yet it is also true that a charity should have, and must have, a right to its property within its own charitable limitations. In other words, as Professor Gray very aptly says, "The remote future interest is objectionable, because the law does not allow an interest so uncertain in value to hamper the present ownership." The charity — within the limitation of the devise being to it in perpetuity — must hold the property as free from future limitations as must the individual. The charity should have all the rights of ownership, save the right to divert the fund from the charitable purpose. Because the charity may hold property in perpetuity is no reason why the gift should not be subject to all the other rules of law. It may hold it in perpetuity, but it must hold, within this limitation, as free as an individual must hold. The law permits property to be given to charity by reason of the public good accomplished by charity.

The rule which governs the *vesting* of a charitable gift is the same which governs the *vesting* of a gift to an individual: it cannot be created to commence at a future time beyond the limits of the rule. Now, why is not the charitable gift equally subject to every other rule applicable to a gift to an individual? Giving property to charity forever is one thing. Making it a qualified ownership in this respect, *e. g.*, that it must always be used for the benefit of a certain object, is all right, of course; but this is as far as the law will interfere with an absolute ownership; no other possible exemption, etc. has been extended to charity. In all other respects, the gift must be governed as would any other gift; hence, to make it go over on a remote condition is as bad in the case of a charity as it would be in the case of an individual; there must be a vested right to deal with the property as any other owner could — save that it is given to an object forever. With this single limitation, then, the gift to charity must not be hampered by any remote future interests.

It seems from Lord Cottenham's words, already quoted, that his error was this: he knew that a charity can receive a gift in perpetuity, *in perpetuum*, therefore he asks, What difference does

it make if it goes over from one charity to another? But this reasoning of course is solely from the point of view of public policy: the public had no interest in it, the property was withdrawn from the avenues of trade, as it were, therefore why could not another charity succeed to it? and from the standpoint of public policy relative to charities, this was perfectly sound. Lord Cottenham thought: The rule requires the charitable gift to vest within the proper limits, but after it has once so vested there it remains, devoted to charity forever. Now, having vested in charity forever, why cannot it pass from one to another? If it is a charity, it is for the public good, and is it not immaterial what charity it is for? are they not all equally for the public good?

But the vice of the above reasoning, as I have already said, is this: the charity itself has rights, and when public policy granted to it the right to hold property in perpetuity, it altered no common law right of property; it simply extended to it the privilege of holding property forever, but it in no way curtailed the common law way in which that property should be held, save that it must be held for the charity forever. There is no reason why the charity should not hold as the individual, and anything which interferes with the gift to the individual, which is void as transgressing the rule, should apply equally to the gift to charity.

Let me briefly summarize what I have said : —

(1.) Lord Cottenham did not use the word “inalienable” in the narrow sense of the mere inability to make title to property, but rather in the broader sense of the fact that it was devoted forever to charity; it was “inalienable” in the sense that it was outside the avenues of trade, it was different from any other gift, it was “inalienable” in the sense that it was given to one object — as no other gift could be given — forever. This was a perfectly natural meaning of the word, on Lord Cottenham’s part, as he had in his mind *the* chief characteristic, rather than *a* minor characteristic of a charitable gift. Surely every one will admit that the most important feature of a charitable gift is the fact that the property may be given to it *in perpetuum*, and that it is a minor characteristic that the charity may not alienate the subject of the gift. In a gift of \$100,000 to charity, the question of “inalienation” is not at all involved in the sense of inability to make title, whilst, on the contrary, it is deeply involved in the sense of the inability to appropriate the \$100,000, or, even if the gift consists of land, to appropriate it or its proceeds to any other purpose than to the



charity forever. The \$100,000 is clearly "inalienable" in this sense; if it is not, and if charity can use the gift for any other purpose, then money cannot be given to charity.

(2.) Lord Cottenham erred in deciding that property can be transferred, beyond certain periods, in a certain event, from one charity to another charity. He reasoned in this way: he knew that a gift can be made to charity in perpetuity; therefore, he thought, what difference does it make if it goes over, on the happening of a certain event, from one charity to another? From the point of view of public policy — the public has no interest in it — the property is, as it were, withdrawn from the avenues of trade; therefore why cannot another charity succeed to it? And from the standpoint of public policy Lord Cottenham was perfectly sound. But the vice of his reasoning is this: he regards the question solely from the point of view of the public policy, which permitted a gift to charity to remain forever afterwards devoted to the charitable purpose, but he did not recall the fact that the only alteration which public policy makes in the common law is that the property may forever remain devoted to the one purpose, but public policy in no way curtails the common law way in which that property should be held; the charity has its rights, and there is no reason why it should not hold as the individual holds. The rule as to the vesting of the gift is quite the same in both the charitable and the individual gift; they both must vest within the proper limits; then, after vesting, why should not the same rule continue to be applied to both, always excepting the fact that the future of the charitable gift is determined forever? But this feature of the gift is really quite similar to the gift to the individual in fee, because they are both a *final* disposition of the property, — the fee to the individual, the fee to the charity, — only one is possibly of longer duration than the other, as the life of the charity may be longer than that of the individual, but both are equally final dispositions. Now, why, in the case of an individual, does public policy demand that the absolute power of doing as one wishes with property shall vest within a certain period? I do not mean to enter the field of economic discussion, but the answer of course is, that this freedom of ownership tends to the advancement of the individual and to the encouragement of enterprise; if no one ever had the freedom of ownership, the creation of wealth would be at its lowest point. Hence, in the case of the individual, the law provides that the freedom of owner-

ship shall vest within a certain limit, and in not applying this rule to charity Lord Cottenham erred. The fact that the property remains in the charity forever is no reason why the rule should not apply. The gift to the charity should be regarded *at any one moment*, as the gift to the individual is regarded; in the latter, the rule does not permit a future interest so remote and uncertain in value to hamper a present ownership, and it is quite clear, on principle and authority, that the same rule should apply to the charitable gift. If a fund given to charity can, at some very distant period of time, be taken from that charity, then the healthy and natural growth of that charity is just as much checked as would be the growth of the individual under similar conditions. The law has said this shall not take place in the case of the individual, and the logic and consistency of the law demand that the charity shall be governed by the same rule.

In conclusion, I will add that it may be urged against my argument that it consists simply of an attempt to explain the meaning of Lord Cottenham's words. I am willing to plead guilty to this indictment, for is it not, in a great measure, the life-work of us lawyers to explain the meaning of our judges, — to seek exactly their use of words, — to distinguish or apply, to extend or qualify just what they have said, — in short, to reconcile, and if possible always to reconcile, their words with the principle involved?

*Richard Mason Lisle.*

# HARVARD LAW REVIEW.

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THE LAW SCHOOL. — Since the statistics of the School below were prepared the registration in the School has passed four hundred and risen to four hundred and two by the addition of one to the third-year and two to the first-year class. Of the first-year men, one is a graduate of Harvard and one of De Pauw, the latter bringing the number of colleges other than Harvard represented in that class up to fifty-one. It is just five years since the REVIEW had the pleasure of announcing that the registration had passed two hundred and fifty, and now the School is more than half as large again as it was then.

In the last number it was said that the returns showed a most gratifying increase in the numbers of the School. More than this, it now appears that the School as a whole, and each class, is larger than ever before. The following figures show the total registration at this time of year for six successive years: —

	1889-90	1890-91	1891-92	1892-93	1893-94	1894-95
Third year . . .	50	44	48	69	66	81
Second year . . .	59	73	112	119	122	135
First year . . .	86	101	142	135	140	170
Specials . . .	59	61	61	71	23	13
Total . . .	254	279	363	394	351	399
						Now 402

The registration of the current year is noteworthy in several respects. In the first place the number of specials is less than one fifth of the number of two years ago. This may be partly accounted for by the fact that the privileges of specials under the future order of things do not seem to be clearly or widely understood. A special has, and will have, every privilege of the School in as full a respect as a regular student, with the single exception that he must in the future attain creditable standing in order to get his LL.B.; and he is not and will not be called upon to take more than the present admission examinations. One would think,



therefore, that the list would be a larger one. The explanation is to be found in the fact that specials who do not work have been thoroughly discouraged, and for those who desire to work hard the regular classes are as accessible. Probably after the increase in the requirements for regular standing goes into effect next year the number of the specials will rise again. The pendency of the increase in requirements also accounts for the second noteworthy figure, the increase of over twenty per cent in the numbers of the first-year class. But the remarkable size of the third-year class, also twenty per cent larger than that of last year, though formed out of a second-year class really no larger, is perfectly normal, and must be due to a recognition both of the increase in the quantity of instruction offered and of the advantages of a third year of study.

The usual table of the sources of the degrees held by the members of the first-year classes is next given for the five years last past. Under the sources of degrees men are divided again according to their respective homes.

## HARVARD GRADUATES.

Class of	From Massachusetts.	New England outside of Massachusetts.	Outside of New England.	Total.
1893	34	1	19	54
1894	30	2	17	49
1895	32	4	13	49
1896	23	7	17	47
1897	27	2	15	44

## GRADUATES OF OTHER COLLEGES.

Class of	From Massachusetts.	New England outside of Massachusetts.	Outside of New England.	Total.
1893	5	9	21	35
1894	7	20	38	65
1895	8	14	30	52
1896	14	11	45	70
1897	9	12	56	77

## HOLDING NO DEGREE.

Class of	From Massachusetts.	New England outside of Massachusetts.	Outside of New England.	Total.	Total of Class.
1893	4	1	7	12	101
1894	20	1	10	31	142
1895	16	3	14	34	135
1896	10	4	9	23	140
1897	26	7	16	49	170

Thirty-nine colleges send one man apiece, ten colleges send from two to four men each, and Yale sends eight; Leland Stanford, Jr. sends none this year, as against five last year, — a decrease probably due to the starting of the Law School there; on the other hand, the University of California sends four in place of one. The greatest matter for congratulation here is probably to be found in the increased number of other colleges which send their graduates hither, — fifty this year, as against about thirty last year. This goes to show that the influence of the School gains steadily. Another bit of evidence to the same effect is that there are seventy-two real strangers, men who are neither residents of New England nor Harvard graduates, as against fifty-four such last year.

In a valuable address delivered by Mr. James C. Carter of New York to the last graduating class of the Law School of the Columbian University,

(entitled "Hints to Young Lawyers,") there is one passage which will be especially interesting to those who have studied in the Harvard Law School within the last twenty-five years. Mr. Carter says: "The importance to the lawyer, and especially to the young lawyer, of making each task he may be called upon to perform the special means of enlarging and disciplining his own powers will be better understood if we consider the different degrees of ease with which the same knowledge may be acquired under different conditions of the mind. When the student, under the influence of no other motive than the feeling that it is necessary for his general purposes, applies himself to the study of some special subject, he is obliged to compel the attention by a conscious exertion of his will,—always a painful labor; the work soon becomes irksome, the attention is constantly diverted, the impression on the mind is slight and evanescent, and the task is apt to be thrown aside in disgust. Far otherwise, however, when the lawyer is employed upon some concrete question arising in the actual affairs of men, when there is an immediate object in view; . . . the whole mind is wakened into activity, and experiences the highest of intellectual pleasures, that of overcoming difficulties; it is not satisfied with one acquisition, but demands more; what would otherwise be work becomes play." And, Mr. Carter goes on, "You will begin to see that the law consists of a few general principles, and that its variety and difference proceed only from the infinite variety of the facts with which it deals." He is speaking, as his context shows, of the actual working up of a case in practice. Nevertheless, the case system of instruction, to its credit be it said, is fairly described by his words. No one can study law with the actual cases before him without seeing the dramatic force of the situations which they present, or without experiencing "the highest of all intellectual pleasures" in mastering for himself the difficulties which have been struggled with by past and present generations of judges in their attempts to apply "a few general principles of justice" to the infinite diversity of the facts which have been brought before them by *Angus and Dalton*, *Perrin and Blake*, *Patch and White*, *Dred Scot* and *Sandford*, and the millions of less known litigants, whose troubles have been none the less real, though they serve now only to add bulk to the digests. There are, and will be, men who study law only because they see in it a necessary means to a living, as they would work a treadmill in the poorhouse; but to those who will care for their profession, and love it as it deserves to be loved by its every member, a distinguishing merit of the case system of study is to be found in that close friendship with the courts in their actual work of doing justice which Mr. Carter urges, and which his forcible oratory should inspire.

In another respect also Mr. Carter's address is valuable; for when a man of his standing in the profession speaks out to his juniors from his own experience they cannot fail to get some insight into the causes of success; and a man of his standing rarely speaks out so freely.

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CAN ONE CHEATED INTO PLEADING GUILTY MAINTAIN AN ACTION FOR IT?—In *Johnson v. Girdwood*, 28 N. Y. Suppl. 151 (N. Y. City Common Pleas), it appeared, upon demurrer to the complaint, that the plaintiff was arrested and prosecuted on the false and malicious complaint of the defendant, and that on the representation of the defendant that a plea of guilty "would benefit the plaintiff, and would terminate the proceedings



against him, and that he would be released from arrest and imprisonment," the plaintiff pleaded guilty, and promptly got ten months in jail. Pryor, J., and Daly, C. J., in able opinions, said that it was not possible that for such a confessed wrong the plaintiff should be remediless; that the judgment was an estoppel only between the plaintiff and the government, and that it certainly could not under these circumstances be used as a shield for the defendant, whether or no the action came within the lines of any previous cases. They ordered judgment for the plaintiff, with costs, Bischoff, J. concurring.

The case may go through one or more stages of appeal before final decision, and final comment on it is therefore not possible. But there are considerations which may for the sake of convenience be put in the form of an argument against this result. The court appear to regard the action as for a new species of grievance; but it certainly bears a suspicious resemblance to the familiar action for malicious prosecution; and if viewed in this light its maintenance upon the admitted facts is apparently at variance with one of the fundamental legal doctrines under that head of the law; for, among other requisites to the maintenance of that action, it has been considered essential, not only that the original prosecution should have been terminated, but also that it should (except in *ex parte* cases) have terminated favorably to the original defendant. This decision practically dispenses with the latter requirement in cases where the original complainant has by fraud prevented the accused from making a successful defence. Unless the general rule is to be completely abolished, is not the expediency of this exception open to doubt? The original judgment ought to be vacated for fraud, and in at least one jurisdiction that would probably be done (*Buzzell v. State*, 59 N. H. 61). But so long as it stands unreversed, is it desirable to allow an action for maliciously procuring it? In *Severance v. Fudkins*, 73 Me. 376, it was held that judgment upon a verdict of guilty, though procured by the perjured testimony of the complainant, effectually bars an action for malicious prosecution. What difference is there between the complainant's testifying falsely against the accused, and his fraudulently inducing the accused to testify falsely against himself? What difference is there between wrongfully procuring a verdict of guilty, and wrongfully inducing a plea of guilty? Is not the judgment procured by fraud in the one case as well as in the other? Or if there be a distinction between the two cases, is there not more reason for denying an action to one who has himself confessed his guilt, than to one who has been convicted of guilt upon the testimony of others? It is believed that the denial of remedy in cases like *Severance v. Fudkins* is not properly based upon the theory that the judgment operates as a technical estoppel, nor is it based solely upon the protection which the law affords to witnesses, but rather upon the general public policy of discouraging actions for malicious prosecutions. It has been said that where a conviction in a court of the first instance, subsequently reversed in a higher court, was procured by the fraud of the complainant, he could not avail himself of the conviction as evidence of probable cause, or as a bar to an action. See cases in Cooley, Torts, 2d ed., 214, n. 3, and *Burt v. Place* 4 Wendell, 591. But it will be noted that in these cases the prosecution had finally terminated favorably to the accused. They do not go so far as to hold that the original defendant could have maintained an action if he had not appealed, or if his conviction had not been reversed in the higher court.



To sustain the decision in the principal case it will then be necessary to distinguish between the wrongful institution of a prosecution and the wrongful carrying on of one after it has been wrongfully commenced. But is it not a question for serious consideration whether the grounds of public policy which forbid an action for the former prosecution unless it has terminated favorably to the accused do not also apply to this action for the latter wrong? All this is meant by way of argument rather than as criticism.

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SHOP-BOOKS WILL UP. — Order XXX. Rule 7, promulgated by the English Supreme Court in August, 1894, to the effect that, on the hearing of the summons, the court or a judge may order that evidence of any particular fact, to be specified in the order, shall be given by statement on oath of information and belief, or by the production of documents or *entries in books*, or by copies of documents or entries, or otherwise as the court or judge may direct, (35 Weekly Notes, 1894, Sept. 1,) is a noteworthy step, and one of some importance in the law of evidence. In spite of the reliance placed by merchants upon the accuracy and trustworthiness of commercial memoranda, account-books, statements, receipts, etc.; in spite of the fact that this confidence in their responsibility as modes of proof has been recognized and enforced in the Roman, French, Scotch and American laws (though to different extents in the various States of the Union); in spite of an English statute (7 Jas. I. c. 12), as yet unrepealed and to be found as still law in Vol. I. of the English "Statutes Revised," p. 691, — the English upper courts, at least, have steadily regarded this admission of shop-book evidence as inconsistent with the principles of common law, and have done their best to discredit it on that ground.

Although text-writers have deplored this attitude of the English courts, as one founded in a misapprehension of the law, and have endeavored to encourage as much as possible the admission of such evidence, (Thayer, *Cases on Evidence*, 470, note, 506, note; Greenleaf on Evidence, § 118 *et seq.*, and notes; Taylor on Evidence, 7th ed., § 709.) yet with the exception of the relaxation in the Chancery Procedure Act of 1852, the English courts have almost unwaveringly maintained their attitude until the present time. Now, however, by a sudden and decisive change of front, they have boldly adopted in a generalized form that rule against which they so bitterly fought, and, in their latest batch of orders of court, have given a decided recognition of the fact that they had gone too far in discrediting that evidence, on which business men almost implicitly rely.

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FLETCHER *v.* RYLANDS. — Although there is probably no decision of the Supreme Court of Massachusetts exactly in point, its tendency, at least, appears hitherto to have been strongly directed toward the doctrine of *Fletcher v. Rylands* (L. R. 3 H. of L. 330). That case is cited, again and again, in many decisions with marked approbation, in few, if any, with anything approaching disapproval. Indeed, taking in consideration the long and respectable line of dicta that way, it was to be anticipated, perhaps, that that doctrine would finally be adopted as the settled law of the Commonwealth. Such expectations have, however, received a rude shock in the latest decision of that court, *James Cork et al v. Barney Blossom et al.*

In this case, an action of tort for the fall of the chimney of a planing mill, caused by a heavy but not unusual gale, the lower court had charged that the ordinary rule of negligence was the test of liability. On exceptions to this charge, the upper court sustained the exceptions, and decided that, whatever the rule was, it was not the ordinary unqualified rule of due care. In the lower court, it appears, the plaintiff had requested instructions, which roughly but practically embodied the modified doctrine of *Fletcher v. Rylands* now prevailing in England (5 H. L. R. 186, note 1). As this doctrine was, however, considered by the upper court as giving the plaintiff more than he was entitled to, the question naturally arises, since both the ordinary rule of negligence and that of *Fletcher v. Rylands* (a case nowhere expressly mentioned in the decision) appear equally wrong, what is the correct test in the present case? On this point the court's views are decidedly ambiguous. In one place it seems to approach the "ordinary care" rule, in another to adopt a sort of modified *Fletcher v. Rylands* rule, in which the defendant is not liable for latent defects which no human foresight could reasonably be expected to anticipate or prevent; in short, after destroying much, the court constructs nothing. What, then, is this case to stand for?

Some light is shed upon this point by the authorities cited. The long line of Massachusetts cases, and the fact that some English decisions are also relied upon, might well lead one to regard the attitude of the court as significant of an unwilling deference to what it could not easily disregard. It does not look *Fletcher v. Rylands* squarely in the face. If it approaches that peculiar case at all, it is only by being dragged backwards in its direction; if it adopts it at all, it is only with such sweeping qualifications as to reduce that doctrine to hardly more than that of those cases where, though the want of due care is a necessary element of liability, the mere occurrence of the accident is held to raise a presumption of negligence. It would seem, moreover, that the court's citation of Pollock on Torts, 393, 394, which is practically an authority for the view last mentioned, expresses a strong leaning that way. In any case, the decision bodes ill for the future of *Fletcher v. Rylands*, in Massachusetts at least.

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LIDLAW v. RUSSELL SAGE (THE DYNAMITE CASE) GOES TO A THIRD TRIAL. — The Supreme Court of New York, General Term, on October 13th, reversed a judgment of the Circuit Court which had been rendered in favor of the plaintiff in the case of *Laidlaw v. Sage*, and ordered the case to a third trial (30 N. Y. Sup. 496).

In the HARVARD LAW REVIEW for January, 1894, the opinion of the Supreme Court in this same case, reversing a judgment of the Circuit Court and ordering the case to its second trial, was noticed, the circumstances of the case were stated, and it was suggested that the discussion of the "burden of proof" by the Supreme Court seemed not wholly satisfactory. That suggestion appears to have been justified by the fact that Mr. Justice Patterson of the Circuit Court, at the second trial, was so far misled that he read to the jury an extract from the opinion of the General Term, the effect of which was to charge that the plaintiff was entitled to a recovery unless the defendant should show that the plaintiff's injuries would have been as serious as they were if he had not been interfered with. The Supreme Court now say clearly that this charge was erroneous, and a misrepresentation of their conception, which



would not have been possible, had the trial judge not separated the extract which he read to the jury from the context. The conception which the Supreme Court meant to enunciate was, that, if the plaintiff should be able to make out a *prima facie* case for the jury, the burden of going forward with the evidence, with a view to destroying the plaintiff's case, would rest upon the defendant. This is clearly sound law.

It was said in the note which has been referred to, that at the next trial the defendant would probably advance the theory that his act was instinctive, and ask for an instruction to the jury that, if his action was involuntary, and such as would instinctively result from a sudden and irresistible impulse to escape a terrible danger, he was not liable to the plaintiff for the consequences of it. It was submitted further, that it was difficult to see how such an instruction could be refused. On the second trial the defendant's counsel requested the court to charge that, "If the jury find from the evidence that the defendant did take the plaintiff and use him as a shield, but that this action was involuntary, or such as would instinctively result from a sudden and irresistible impulse in the presence of a terrible danger, he is not liable to the plaintiff for the consequences of it." The court declined to give the instruction precisely in the words requested, but charged instead, that the essence of the liability must be a voluntary act. The Supreme Court (Van Brunt, P. J.) now declare that this was error, and that the defendant was entitled to have the instruction which he asked for submitted to the jury. "The essence of the liability," the court says, "is not whether the act of Sage was voluntary or not. An instinctive act may be voluntary; an act done upon the spur of the moment, in anticipation of impending evil, may be voluntary. But such acts are not the result of an intent based upon reasoning." If the act of the defendant was of this character, the court appears to believe that he ought not to be held liable for the consequences of it.

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**COLLATERAL INHERITANCE TAX.**—The case of *Minot v. Winthrop*, decided October 17, 1894, by the Supreme Court of Massachusetts, involves some points of more than local importance. It raises the question whether the St. 1891, c. 425, imposing a collateral inheritance tax, is constitutional. One of the objections urged against this statute was that the right of succession was a necessary incident of property, protected by the Constitution of Massachusetts and that consequently the State could not tax it. As was to be expected, the court declined to take this view and upheld the statute. (There is a dissenting opinion, but on another point.) The court holds that the State has full power to regulate the devolution of property on the death of the owner, subject only to the limitations that such regulation be reasonable, and that no property be taken, either by taxation or directly, except for the public service. To conclude from this, as the court does, that the State could not take away altogether the inheritable quality of property is to go further than is necessary in this case. Undoubtedly the private inheritance of property is, in some measure, a social necessity in our age, and an abolition of it would at present be neither reasonable nor a taking of property for the public service. But the Constitution is a growth, and it is conceivable, though not likely, that a time might come when such a measure might be very differently viewed, even under the present Constitution.

Aside from these limitations, however, whose severity may vary with



the structure of society and the conditions of life in general, it seems perfectly clear that the State has complete authority to regulate the transmission of property after the owner's death. The only grain of truth in the proposition that inheritance is a "necessary incident" of property or, as is sometime said, "a common law incident," seems to be this. It is necessary to the idea of private property that there be a succession of some kind on the death of the owner. Who shall succeed is quite a different question, and has been answered differently at different times and places. Private succession we have had for centuries, but it is no more a consequence of the conception of property than is transferability *inter vivos*.

It is hardly necessary to say that property is here used in the sense of general property, applying therefore only to the fee of land and the general *dominium* of chattels. It is no argument in favor of the proposition we have been supporting to cite the case of the occupant of an estate *pur autre vie*, 8 H. L. R. 167 (Nov., 1894).

The case of *Minot v. Winthrop* is further interesting from the fact that it introduces into Massachusetts a new commodity. In order to uphold the statute it is necessary to bring the right of succession under the head of "commodities" in the Constitution. This the Supreme Court does, though not without flinching. It has been held that a corporate franchise is a commodity. It is difficult to see, then, why the exercise of any private right is not one also. Having once departed from the economic conception of commodity, the court has only to be consistent with itself. In *Gleason v. McKay*, 134 Mass. 419, it was held that a partnership with shares transferable without the special assent of the members was not a commodity. It is difficult to distinguish that case from this, and Lathrop J., in his dissenting opinion, finds it impossible to do so. The majority of the court, however, think that *Gleason v. McKay* really decided nothing more than that it was unconstitutional to impose a tax on that particular kind of partnership alone, such a restriction being unreasonable. If the case decided no more than that, the court at the time certainly thought it was going further. Nothing is said about the reasonableness of the tax in the report of *Gleason v. McKay*. A similar interesting case in another State is *State of Maine v. Hamlin*, 30 Atl. R. 76.

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**STRIKE INJUNCTIONS.**—The reports recently printed of the cases ensuing upon the injunctions issued against the strike leaders of last July afford an opportunity of considering the legal side of the trouble,—a side not frequently discussed. There are, first, a few cases which have endeavored to compel specific performance of their contracts on the part of the striking employees, *S. California R. R. v. Rutherford*, 62 Fed. Rep. 796, compelling the hauling of Pullman cars as long as the employees worked for the company at all, and a case of last December which enjoined employees from quitting work on a road in the hands of the court's receiver, *Farmer's L. & T. Co. v. N. P. R. Co.*, 60 Fed. Rep. 803; but the latter case has been overruled in the Circuit Court (Chicago Law Journal, Vol. V. n. s. p. 461). It must be allowed as settled that these cases are wrong, and there has been little or no attempt to infringe upon the rule that no specific performance can be compelled in a contract for personal service, however great the value of the service may be. This is admitted in all the other cases which have been decided, and though it is

hard to see reason why equity should not in proper cases interfere, it must be taken to be the undoubted law. It may perhaps be added that the practical value of a compelled personal service would in most cases hardly justify its enforcement.

The injunction really possible and quite effective was of a different kind, however; it was in restraint of what when committed would have been a tort,—a conspiracy to induce the employees of a railroad yet in its service to withdraw. What a conspiracy precisely is no one knows. Its definition is always question-begging, and the only intelligible meaning of it seems to be that there is an indefinite class of offences which become conspiracies because several combine in their execution, and so render opposition by an individual more difficult; Mr. Justice Harlan in *Arthur v. Oakes*, Chic. Law J., Oct. 1894, and Lord Esher in *Temperton v. Russell*, 1893, 1 Q. B. 715. There is, however, no occasion in these cases to deal with so misty an offence as conspiracy. Taft, J, in *Thompson v. C., N. O., & T. P. R. R. Co.*, 62 Fed. Rep. 803, puts the issue of injunctions upon the right ground in referring them to the law recognized first in *Temperton v. Russell*, *supra*, and, though not altogether settled, at least familiar to lawyers. If it be a tort which a common law court will recognize to induce another not to enter into, or, as here, not to continue, a contract with the plaintiff from motives other than those which the law will admit to be proper, it is no great step to enjoin one from the proposed commission of such a tort. Doubtless the precise definition of the motive which in these cases renders a defendant liable is as yet very far to seek; but there can be little doubt that, whatever it is, that which dictates a "boycott" of the extent of that of last July is quite within its scope. In Judge Grosscup's charge to the grand jury (62 Fed. Rep. 828) the difficulty is dealt with,—of course now in connection with indictments,—and a large scope is left for innocent motive by requiring only that a leader of strikes mean the welfare of the members of his association. Whether that be the right line or not, the purpose in the cases in question was to benefit persons quite disconnected with those who conspired, and to compel the companies altogether to give up their business. Of course, when threats and violence were used, there could be no doubt of the illegality of the conspiracy.

The injunctions issued pursuant to the Act of July 2, 1890, which gave Federal courts power to enjoin against any interference in restraint of interstate commerce or the passage of the mails, (*U. S. v. Elliott*, 62 Fed. Rep. 801; *U. S. v. Agler*, 62 Fed. Rep. 824,) stand quite alone, and do not call for comment.

Last comes the "omnibus injunction" issued against the world at large by Grosscup and Woods, JJ. It is difficult to see how such injunctions can stand the test of precedent or principle. An injunction issues in a civil suit against a party who has been complained of at least, and has had notice of the motion of his adversary. To be obliged to wait until the injunction is violated to determine against whom it was issued ought to be enough to show that it is not an injunction at all, but in the nature of a police proclamation, putting the community in general under peril of contempt if the proclamation be disobeyed. Courts of equity were evidently not intended to possess such functions, and it must be regretted that Judge Grosscup, in his most commendable eagerness to offset the criminal inaction of Governor Altgeld, should have been forced to such a legal anomaly. The power of a court to imprison for contempt



of its orders or of the persons of its judges is an arbitrary one at best, and to stretch it, as here, in a time of disorders and almost panic in the immediate vicinity, would seem to show that the court has been deserted by the calm judicial temper which should always characterize its proceedings. Some words of Sir George Jessel are much in point in this connection. "It seems to me," he said, "that this jurisdiction of committing for contempt, being practically arbitrary and unlimited, should be most jealously and carefully watched, and exercised, if I may say so, with the greatest reluctance and the greatest anxiety on the part of judges to see whether there is no other mode which is not open to the objection of arbitrariness and can be brought to bear on the subject. . . . I have always thought that, necessary though it be, it is necessary only in the sense in which extreme measures are sometimes necessary to preserve men's rights, — that is, if no other remedy can be found."

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## RECENT CASES.

**AGENCY — IMPLIED NOTICE.** — Plaintiff intrusted money to M. to deposit in defendant's bank, expecting to receive as security either M.'s personal check or the defendant's check indorsed by M. But M. deposited the money to his own credit and received for it bankers' checks payable to himself, representing that he was plaintiff's partner, and proposed to use the checks as memoranda in making a settlement. M. indorsed the checks to plaintiff, who received them in the idea that they represented deposits made according to agreement. Subsequently, M. appropriated the money to his own use. *Held*, that plaintiff was chargeable with knowledge of the acts of M. as his agent, and could not recover. *Henry v. Allen*, 28 N. Y. Supp. 242, Bradley, J. *dissenting*.

The hardship engendered in this case by a strict application of the rule imputing to the principal the knowledge of the agent is obvious; and while the opinion of the court may be correct, it would seem that the reasoning of the minority leads to a more equitable result. The text writers, whose words are cited to sustain the opinion of the majority, are referring to implied notice in its application to the rights of a third party as plaintiff, and the quotations therefore are not directly in point. It has become firmly grafted to the general rule of implied notice in other jurisdictions, that such notice will not be presumed where the agent is doing an independent fraudulent act. This has received ample confirmation in Massachusetts. *Innerarity v. Bank*, 139 Mass. 332; *Allen v. R'y Co.*, 150 Mass. 206. The amount involved in the main case is sufficient to justify re-argument, and an authoritative statement from the Court of Appeals, determining the extent to which fraud on the part of the agent affects the doctrine of implied notice, will be awaited with interest.

**BILLS AND NOTES — ACTION BEGUN ON LAST DAY OF GRACE.** — This was an action by the holder against the acceptor. On the last day of grace the bill was presented at the bank, where by the acceptance it was made payable, and at a later hour on the same day plaintiff issued the writ in this action. *Held*, that the holder cannot sue the acceptor until the expiration of the last day of grace, although he could treat this as a dishonor and give notice to the drawer or indorser. *Kennedy v. Thomas*, L. R. [1894] 2 Q. B. 759.

The English Court of Appeal professes to follow certain cases in this holding, — *Wells v. Giles*, 2 Gale, 209, and *Leftley v. Wills*, 4 T. R. 170, — and neither of these necessarily stands for this view. In *Wells v. Giles* it does not appear that there was any demand at all, so the case could well stand on that. In *Leftley v. Wills* Lord Kenyon does rest the case on this ground, — *i. e.* that the acceptor has the whole of the last day in which to discharge the obligation; but, as Buller, J. shows, the case might well have been decided as it was, on the ground that the demand was not made at a reasonable time, — within business hours. It seems, therefore, that the court was not bound by authority, and that, on principle, the view adopted by the court is erroneous. The custom of merchants is that the holder shall determine reasonably at



what time of the last day of grace the bill or note shall be paid; whereas the ordinary debtor has until the last moment of the day, there being no duty in the latter case on the creditor to demand payment. For collections of authorities on the subject see Ames's Cases on Bills and Notes, Vol. II. pp. 86 and 95, n. 4; also 2 Daniel on Negotiable Instruments, p. 241, §§ 2 and 3.

**BILLS AND NOTES—DELIVERY IN ESCROW.**—*Held*, that notes could not be delivered in escrow to the agent of the payee to hold till the maker could investigate the indebtedness for which they were given. *Murray et al. v. W. W. Kimball Co.*, 37 N. E. Rep. 744 (Ind.).

Although a note cannot be delivered to the payee or his agent in escrow, following the analogy of deeds (Co. Lit. 36 *a*), there would be an equity between the parties as to the effect of the instrument. It would be much better to do away with the technical doctrine of delivery of deeds as applying to notes, and follow the analogy of chattels. 6 Am. & Eng. Enc. 862; Ames's Cases on Bills and Notes, Vol. II. p. 99, and cases cited.

**BILLS AND NOTES—FRAUD—SUFFICIENCY OF PLEA.**—In an action on a promissory note by the indorsee against the maker, the latter alleged fraud in the inception of the note. The plaintiff obtained judgment on the pleadings, on the ground that the answer should have alleged that plaintiff had knowledge of the fraud at the time it was indorsed to him. On appeal it was *held*, that the burden of proving *bona fides*, which includes a want of knowledge of the fraud alleged, was upon the plaintiff, and if so the burden of pleading this want of knowledge was his also. *Thamling v. Duffey*, 37 Pac. Rep. 363 (Mont.).

The authorities on the question of pleading here involved are apparently in hopeless conflict, but the diversity is chiefly due to the extreme looseness with which the courts use the phrase "burden of proof." Fraud in the inception of a note is a personal defence, and is demurrable unless the action is by the payee. When an indorsee sues, the plea should also allege that the plaintiff and every one in the line through whom the plaintiff claims had notice of the fraud or gave no consideration, for the plaintiff is protected if he has succeeded to the rights of a *bona fide* purchaser who has intervened. At the trial, it is the duty of the plaintiff to go forward with evidence to disprove the notice or lack of consideration alleged, but the burden of establishing them remains with the defendant throughout. If a bill were brought to enforce an equity against one who had obtained the legal title to land, chattels, or notes, there could be no doubt upon whom the burden of proving notice would lie. 100 Mass. 190. The question in the principle case would seem perfectly analogous. Langdell on Equity Pleading.

**CARRIERS—REFUSAL TO TRANSPORT FREIGHT—TENDER.**—A dispute having arisen between plaintiff and defendant in connection with matters not involved in this case, defendant informed plaintiff that it would not carry any more coal for plaintiff over its road. Plaintiff, relying on this statement, tendered no more coal to defendant for carriage, but subsequently, and in consequence of this refusal, was forced to give up its business, and brought suit against defendants for refusal to transport coal. *Held*, the refusal of the carrier does not in the absence of tender of a definite amount for transportation amount to a waiver of such tender so as to subject the carrier to liability for loss of business caused by relying on such refusal. *Wilder v. St. Johnsbury & L. C. R. Co.*, 30 Atl. Rep. 41 (Vt.).

The court cites no cases in its opinion, and there seems to be little authority on this point, but it would seem that common sense necessitates the conclusion reached by the judges in this case. The court confines its decision to cases where the amount of property was in no way ascertained, and expressly declines to consider what plaintiff's rights would have been if the conversation between plaintiff and defendant had "related to some specific property then upon the line of defendant's road awaiting shipment, or even to some distinct proposal dependent upon the defendant's services."

**CHATTEL MORTGAGE—CROPS TO BE PLANTED—RIGHTS OF SUBSEQUENT PURCHASER.**—*Held*, a chattel mortgage on crops to be thereafter planted is void as against a subsequent purchaser at an execution sale. *Rochester Distilling Co. v. Rasey*, 37 N. E. 632 (N. Y.).

It is not questioned that that which has a potential existence may be the subject of a mortgage or sale, but the court declares that the annual product of labor and cultivation cannot be said to have a potential existence before planting. Upon this view the decision is brought within the authority of cases holding that a mortgage of property to be thereafter manufactured or purchased is void. *Otis v. Lill*, 8 Barb. 102; *Gardner v. McEwan*, 19 N. Y. 123. While deciding that crops not yet sown do not have potential existence, the court distinguishes such cases as *Andrew v. Newcomb*, 32 N. Y. 417, and *Caffrey v. Woodin*, 65 N. Y. 459, which hold that crops not yet sown may be

mortgaged by a lessee to his lessor as security for rent, on the ground that, title being in the lessor, the agreement between the lessor and lessee for a lien upon the crops operates as a reservation of title in the lessor to the products of the land. *Conderman v. Smith*, 41 Barb. 404, seems to be inconsistent with the principal case. There a lessee of a farm and cows mortgaged to the lessor the butter and cheese to be made during the season, and the mortgage was held good as against a subsequent purchaser of the cheese at an execution sale. The doctrine of reservation of title does not apply there, for the mortgage was made subsequently to the lease and was not a part of it. Of the question whether crops not yet sown have a potential existence, see authorities collected in the American note, Benjamin on Sales, 6th American edit., p. 86.

CONTRACT — RESTRAINT OF TRADE. — *Held*, that a combination of wholesale dealers to control the price of beer within a city is not void as in restraint of trade. *Anheuser Busch Brewing Ass'n v. Hough*, 27 S. W. Rep. 692 (Tex.).

The Pennsylvania court has just reached a contrary result in the case of *Wester v. Continental Brewing Co.*, 29 Atl. Rep. 102. See 8 HARVARD LAW REVIEW, p. 176. The decision here is rested on the ground, that, though beer is a staple of commerce, it is yet not such a commodity that restriction of its sale will be declared illegal by the court.

CONSTITUTIONAL LAW — ELEVATED RAILROADS IN STREETS — TAKING PRIVATE PROPERTY. — A railway company built abutments in the centre of a street to be used as the approach for elevated railway tracks. The abutting land owners did not own the fee in the bed of the street. *Held*, this was not a taking of the property of abutting landowners within the meaning of the article of the Constitution which prohibits the taking of private property for public use without compensation, so as to entitle the landowners to enjoin the completion of the same until compensation be paid for the injury. *Garrett v. Lake Roland El. Ry. Co.*, 29 Atl. 830 (Md.), Bryan, J. dissenting.

The decision seems entirely correct. The sound distinction is taken between consequential damages arising from the defendant's act, and an actual taking. There is no taking, it is said, without some actual appropriation or invasion of the land, though there is a remedy at law for injuries done to the property provided by statute and by the ordinance incorporating the defendant company. The case contains a full review of the American authorities.

CONSTITUTIONAL LAW — INTERSTATE COMMERCE — EMINENT DOMAIN. — Congress incorporated the defendant company for the purpose of constructing a bridge across the Hudson River between the States of New York and New Jersey "in order to facilitate interstate commerce." The plaintiff objected to the company's taking his land for the approaches to the bridge under the right of eminent domain.

*Held*, Congress has power either directly or through a corporation created for the purpose to construct bridges over navigable waters between States, and to take private lands making just compensation "in order to facilitate interstate commerce." *Suxton v. North River Bridge Co.*, 14 Sup. Ct. Rep. 891.

The power of Congress to incorporate was little called for in former times, and doubts were entertained concerning it. Its frequent exercise to-day in keeping pace with the demands of commerce leaves no question as to its existence, and furnishes a notable instance in refutation of the claim that striking out a power is equivalent to prohibition. Mr. Madison proposed in the Constitutional Convention that Congress should be given the power to incorporate, but the proposition was defeated without much discussion. 5 Ell. Deb. 543, 544. That which was then expressly denied is now allowed by implication, if exercised in carrying out any of the delegated powers. 117 U. S. 151, 154; 125 U. S. 12, 13; 127 U. S. 39, 40. "The power of creating a corporation," said Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 411, "though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which powers are exercised, but a means by which other objects are accomplished." The test of the constitutionality of an incorporating act passed by Congress is fairly obvious. Hartshorne's Commerce Clause, p. 29.

CONSTITUTIONAL LAW — INTERSTATE COMMERCE — LICENSE TAX. — A canvassing agent of a portrait-maker at Chicago violated an ordinance of a city of Pennsylvania by soliciting orders for portraits without having paid a license tax. *Held*, whether the tax was levied for general revenue purposes or under the police power of the State, it is a direct burden upon interstate commerce, and therefore invalid. *Brennan v. City of Titusville*, 14 Sup. Ct. Rep. 829.

As many of the State statutes imposing a license tax upon peddlers and canvassers are phrased in general terms, it is well to be reminded of the limited authority by which they are enacted.



CONSTITUTIONAL LAW — POLITICAL RIGHTS — APPORTIONMENT. — Plaintiffs, who are candidates for the office of member of Assembly, seek to enjoin issuing notice of election and certifying candidates thereat under an apportionment act, which they allege to be unconstitutional in that it takes away the right of equal representation. *Held*, a court of equity has no jurisdiction in such a matter, since it involves political rather than civil rights. *Fletcher v. Tuttle*, 37 N. E. Rep. 683 (Ill.).

In the light of the prevalent desire of political parties to reapportion the various States, whenever they are placed in power, and to do it very unjustly, this decision is interesting and instructive. That it is good law cannot be doubted. The "Reconstruction Acts" cases are cited, — *Georgia v. Stanton*, 6 Wall. 50, — and the court discusses also the power, said to be given by the Constitutions of many States to the Supreme Courts thereof, to issue such injunctions. *State v. Cunningham*, 83 Wis. 90. The language of some courts, where this power is given, is often loose, and this is spoken of as a judicial question. It is gratifying, therefore, to have a court come out squarely, and say that it is purely a political matter.

CONSTITUTIONAL LAW — STATUTES — REPEAL — AMENDMENT. — Laws of 1856, c. 179, § 16, provided that "the several cities . . . which under special acts already elect superintendents of . . . schools, . . . shall not be included in any school commissioner's district." It gave the supervisors power to divide their counties, exclusive of such cities, into school districts, as they might deem advisable. Laws of 1864, c. 555, tit. ii. § 2, provided that "the districts . . . as recognized in the election of commissioners in 1863 shall continue to be . . . the school districts . . . except as the same shall be changed by the legislature." Chapter 414, Laws of 1883, was entitled "An Act to amend section 16 of chapter 179 of Laws of 1856" (giving its title). Its first section re-enacted section 16 above "so as to read as follows," and the only alteration was a substitution — immaterial for our purpose — for the words above printed in Italics. It was *held*, that the Act of 1864 had neither directly nor by implication repealed the section of the Laws of 1856 in question. Apart from this, the Act of 1883 "was a re-enactment of the law" of 1856, "and, as an independent statute, is unaffected by considerations whether the provision of law which it purports to amend has been repealed or not by previous statutes." *People ex rel. Strough v. Board of Canvassers*, 37 N. E. Rep. 649 (N. Y.), affirming the decision of the General Term (28 N. Y. Supp. 871), where authorities are collected.

CONSTITUTIONAL LAW — TAXES — COLLATERAL INHERITANCE. — *Held*, section 1 of chapter 146 of the statutes of 1893, imposing a tax upon collateral inheritances, is not a tax upon real and personal estate within the meaning of article 9, § 8, of the Constitution of Maine, which provides that "All taxes upon real and personal estate, assessed by authority of this State, shall be apportioned and assessed equally, according to the just value thereof," but it is an excise, clearly within the power of the legislature to impose. Neither is this act in conflict with the Fourteenth Amendment to the Constitution of the United States, which prohibits any State from depriving "any person of life, liberty, or property without due process of law." *State v. Hamlin et al.*, 30 Atl. Rep. 76 (Me.). See NOTES, p. 226, for a similar subsequent Massachusetts case.

CORPORATIONS — COLLATERAL ATTACK. — *Held*, that the corporate existence of a railroad company was not in issue in an action brought by it to condemn land. *Wellington & P. R. Co. Cashie & C. Railroad & Lumber Co.*, 19 S. E. Rep. 646 (N. C.).

This decision is opposed to the weight of authority upon the point. Most courts hold that, although in ordinary cases the existence of a *de facto* corporation cannot be questioned except in direct proceedings by the State, yet that in the exercise of the right of eminent domain its existence may be questioned by a private person.

Morawetz on Private Corporations, Vol. II. § 768.

CORPORATIONS — COUNTIES — LIABILITY FOR TORTS. — *Held*, a county is not liable for injuries caused an employee at its insane asylum, by the negligence of those in charge of the asylum. Being engaged in the performance of a public duty imposed generally upon every county of the State, — the care of its insane, — it cannot be sued by a private person except under statute. *Hughes v. Monroe Co.*, 29 N. Y. Supp. 495.

A learned author declares that there is a distinction to be made between municipal corporations proper, as incorporated cities and towns, and other organizations, such as townships and counties, which are established without any express charter or act of incorporation. The latter, termed "quasi corporations" are not liable in tort, according to the general rule, except by statute. Addison on Torts (B. & B.'s ed.), § 1526. Dillon on Mun. Corp. Vol. II. (4th ed.) §§ 948-963, lays down the above distinction and agrees with the principal case as to the liability of counties. So New York, *Ensign v. Board*, 25 Hun, 20, and *Alamango v. Board*, 25 Hun, 551, hold the



county not liable. In that State municipal corporations proper are not liable for negligence of their servants when engaged in duties public in character from which no special corporate benefit is derived. *Maximilian v. N. Y.*, 62 N. Y. 164, and cases cited. The decisions in Massachusetts accord with this view. *Howard v. Worcester*, 153 Mass. 426 (1891). The matter is discussed at length in *Hill v. Boston*, 122 Mass. 344. The rule as to counties is approved in *Hollenbeck v. Winnebago Co.*, 95 Ill. 148; *Summers v. County*, 103 Ind. 262; *Sherbourne v. Yuba County*, 21 Cal. 113; *Kincaid v. Harden Co.*, 53 Ia. 430. *Harmon v. St. Louis Co.*, 62 Mo. 313, and *Bigelow v. Randolph*, 41 Gray, 541, approve the rule as laid down, but hold that it does not apply where a special duty is imposed upon the quasi corporation with its consent. The authorities are collected in the principal case, in Dillon on Municipal Corporations at the sections cited, and in *Hill v. Boston*, *supra*.

**CRIMINAL LAW — HOMICIDE — PASSION FROM MERE WORDS.** — In an appeal from a conviction of murder in the first degree, the act of the defendant having been the result of a quarrel, it was *held*, that passion aroused by mere words cannot reduce homicide below the offence of murder in the second degree. *Smith v. State*, 15 So. Rep. 843 (Ala.).

The court say that no principle in our criminal jurisprudence is more firmly established than this one. Yet while it is true as a general rule that mere words are not sufficient provocation to reduce the offence to manslaughter, this statement of the principle seems to be too strong. A recent English case (*Regina v. Rothwell*, 12 Cox C. C. 145), while admitting the rule, holds that there may be circumstances which would warrant a departure from it, and lays down what appears to be a better rule, that the provocation, whether by words or otherwise, must be sufficient to cause an ordinary man to act as the defendant did. The result reached in the principal case is however perfectly sound on the facts.

**EQUITY — RESCISSION OF A DEED GIVEN WITH INTENT TO DEFRAUD CREDITORS.** — Where an owner, being apprehensive of an adverse termination to a suit in which he is involved, conveys his property to another without consideration, and with intent to defeat the recovery of a possible judgment, *held*, that he may not, after a judgment in his favor, invoke the aid of a court of equity to compel his grantee to reconvey. *Pride v. Andrew*, 38 N. E. Rep. 84 (Ohio).

The Ohio statute rendering fraudulent conveyances void as against attaching creditors is practically a re-enactment of the statute of Elizabeth; but it is everywhere held that this doctrine has no application as between the parties and their representatives. Equity will not allow a fraudulent grantor to impeach his deed or revoke an executed contract. There is a line of cases which perhaps may be regarded as laying down a modification of the general rule, holding that the grantor may compel reconveyance if the parties are not *in pari delicto*. *Story*, Eq. Jur. § 300; *Boyd v. De La Montaigne*, 73 N. Y. 498; *Poston v. Balch*, 69 Mo. 115. But to claim the benefit of this exception the plaintiff must make out a very clear case of undue influence on the part of his grantee. As such extenuating circumstances did not appear in the main case, relief was rightly refused.

**EVIDENCE — PRIVILEGE — CONFIDENTIAL COMMUNICATIONS.** — Defendant, a physician, having been sued for malpractice, attempted to put in evidence certain occurrences at the examination of the plaintiff. A statute provides that such occurrences and the results of such examinations should be confidential communications, — not to be disclosed without the consent of the patient. *Held*, when the patient sues the plaintiff for malpractice, the privilege is waived. *Becknell v. Hosier*, 37 N. E. Rep. 580 (Ind.).

This seems to be a new question, as no authorities are cited by the court and none are to be found in the text-books. On principle, however, there can be no doubt of the correctness of the decision; for, if this privilege were held to be available to the client in such a case, the physician would never be able to defend himself. In an early Indiana case, — *Nave v. Baird*, 12 Ind. 318, — it was held that in an action against an attorney for malpractice this privilege must be considered waived, and of course there is no practical difference between the two cases.

**FRAUD — CONVEYANCE TO AVOID ATTACHING CREDITORS — NOTICE.** — Where an absolute conveyance of land is made for a consideration grossly inadequate, the grantor retaining a valuable interest in the estate, and both parties acting with intent to embarrass creditors, *held*, such conveyance is void, not only against existing, but also against subsequent creditors and purchasers with or without notice. *Jones v. Light*, 30 Atl. Rep. 71 (Me.).

The authorities are in conflict on the question involved in this case. The conclusion reached is sustained by rulings in Massachusetts, Tennessee, and Kentucky. The

contrary is held in Ohio, Texas, and New Hampshire. *Stevens v. Morse*, 47 N. H. 532, (a well considered case which is not referred to by the Maine court,) decides that the statute 13 Eliz. c. 5, on the provisions of which as part of the common law the opinion in the principal case is based, cannot be taken advantage of by subsequent purchasers as it refers in terms to subsequent creditors. The New Hampshire court also objects that the practical result of the doctrine here advocated will be to nullify the well settled rule that a fraudulent conveyance is binding on the grantor and his heirs, by allowing him, subsequent to the fraudulent conveyance, to resell the land to whom he pleases.

**PARTNERSHIP — ASSUMPSIT — IMPLIED PROMISE.** — Plaintiff sold horse feed; defendant had been keeper of a livery stable to whom plaintiff had sold on credit, the goods being ordered by defendant's servant Stoever. Subsequently another man, Gore, came to plaintiff and bought feed for the same livery stable, and plaintiff, supposing that defendant was still the owner, continued to supply feed, for price of which this action is brought. Defendant claims that he had previously sold out to Gore. The judge below charged the jury that if defendant and Gore were partners defendant would be liable; and continues, "If you find that he was not a partner, that he had sold out in good faith, then it was his duty, as the goods were sold for the same business at the old stand, to have notified Mr. Shaunce [plaintiff] of the change that had been made in the proprietorship of the place. There is no doubt about that. Mr. McCrystal did take the precaution to inform the landlord, but he seems to have forgotten to inform the other people." *Held*, an examination of this record has failed to convince us that there is any substantial error therein. *Shaunce v. McCrystal*, 29 Atl. Rep. 866 (Pa.).

It would have been most satisfactory if the Supreme Court of Pennsylvania had seen fit to state the grounds on which they sustain this charge.

**REAL AND PERSONAL PROPERTY — CONSTRUCTION OF WILL.** — The testator devised his property both real and personal to his wife, giving her full power "to bargain, sell, convey, exchange, or dispose of the same as she may think proper; but if, at the time of her decease any of my said property shall remain unconsumed, my will is that the same shall be equally divided between my brothers and sisters and their children." The devisee entered, conveyed all the property to the defendant by way of gift, and died. *Held*, that under the will the widow took only a life estate in the property; that she held it as a quasi trustee for the remaindermen, having power to dispose of it as she might deem necessary for her support or for the benefit of the estate; but that by gift or otherwise she could make no conveyance involving a breach of faith toward the remaindermen which would defeat their rights, and that therefore the defendant held the property as trustee for them. *Johnson v. Johnson*, 38 N. E. Rep. 61 (Ohio).

This decision reaches a satisfactory result, and seems to be in line with authority both in Ohio and elsewhere.

**REAL PROPERTY — DEDICATION — RIGHT RETAINED BY DEDICATOR.** — In 1839 the United States dedicated a piece of land in Chicago to the public, this to be "public land forever and to remain vacant of buildings." According to an Illinois statute, the plat of the land having been recorded, the fee simple vested in the corporation of the city of Chicago. The defendant is about to divert this land from the purposes for which it was dedicated. *Held*, that the United States has no legal or equitable right to interfere (Brewer and Brown, JJ. *dissenting*). *United States v. Illinois Central R. R. Co.*, 15 Sup. Ct. Rep. 1015.

The majority opinion seems eminently sound. The dissenting opinion is interesting in that it holds that a dedicator may interfere if land is diverted from the purposes for which he gave it, though he parted with all his interest in the land. The opinion is based mainly on *Warren v. Mayor of Lyons City*, 22 Iowa, 351. It is not inconsistent with the facts of that case that the fee remained in the plaintiff, although the court certainly lay down principles broad enough to cover the present case.

**REAL PROPERTY — PRESCRIPTION — TREES OVERHANGING NEIGHBOR'S LAND.** — Where the defendant, without notice to the plaintiff, cut off branches of the plaintiff's trees which had overhung the defendant's land for more than twenty years, it was *held*, that the overhanging of the branches was not a trespass, and that no right was acquired by lapse of time; that the branches might be cut without notice, since no entry on the plaintiff's land was necessary. *Lemmon v. Webb*, L. R. [1894] 3 Ch. D. 1.

The case is right. The court have no difficulty in deciding that there is no prescriptive right, but reach the decision that notice is unnecessary only after long discussion. The last point, however, would seem quite as clear as the first, and not to call for so long a consideration.



**REAL PROPERTY—REVOCATION OF LICENSE—ESTOPPEL.**—The city of Augusta was given power by a special act to remove obstructions from the streets at the expense of the owners. Subsequently, licenses were granted permitting awnings to be erected, and were acted upon. The owners in this action ask to have the City Council restrained from removing these awnings. *Held*, that the city could not grant a perpetual right to maintain awnings, and hence the licenses were revocable; that the city was estopped from revocation until the owner had received a fair return for his outlay, made in reliance on the license. *City Council v. Burum*, 19 S. E. Rep. 820 (Ga.).

The court rightly says that the municipal authorities cannot grant away a substantial right of the public; but it proceeds to give the authorities such power to a certain degree on the ground of estoppel. These seem inconsistent, and it is hard to reconcile the latter with the need of the public to have the obstructions immediately removed. The difficulties of the case were hidden by the fact that all the owners petitioning were held to have received already a fair return for their outlay, thus defeating the estoppel. The court was influenced also by the Georgia rule, that an executed license is irrevocable.

**SALE OF GOODS—ELECTION OF REMEDIES.**—Goods were sold and notes of the vendee given for the purchase price, the title to the goods to remain in the vendor until the notes were paid. The notes being unpaid at maturity, the vendor brought an action on them and recovered judgment. *Held*, he may afterwards retake the goods by replevin. *Campbell Printing Press Co. v. Rockaway Pub. Co.*, 29 Atl. Rep. 681 (N. J.); *Moline Plow Co. v. Rodgers*, 37 Pac. Rep. 111 (Kan.), *contra*.

It is submitted that the Kansas decision is correct. The vendor cannot treat the transaction as valid and invalid at the same time. By bringing an action for the price he has elected to treat the vendee as owner of the goods. *Bailey v. Harvey*, 135 Mass. 172.

**TORTS—CONVERSION—PAYMENT BY A BANKER TO A FRAUDULENT INDORSEE.**—The payee of a crossed check specially indorsed it to the plaintiffs and posted it to them. A third party obtained possession of the check during transmission and altered the indorsement, making it payable to himself. This he presented at the defendant's bank in Paris, and asked them to obtain payment from their London correspondent. This they did, and handed the proceeds to him. In an action for conversion by the plaintiffs, *held*, that the defendants were liable for the amount of the check. *Kleinwort, Sons & Co. v. Comptoir National d'Escompte de Paris*, L. R. [1894] 2 Q. B. 157.

Though this decision seems to bear heavily upon the defendants who have been imposed upon by fraud, yet the holding is clearly right. The action was vigorously contested on the grounds that the plaintiffs had neither possession nor title, and therefore had no standing in court; also that there had been no conversion by the defendants. Obviously, however, the delivery to the post-office is, in legal contemplation, a delivery to the plaintiffs; and being thus in receipt of the check with a valid indorsement to themselves, they maintain trover against a mere wrongdoer. Then in presenting the check to their correspondent bank, and obtaining payment thereon for the fraudulent indorsee, the defendants were clearly guilty of conversion, in that they presented the check in the name of a stranger who had no title in it, and obtained payment for him.

**TORTS—DEFAMATION—BELIEF OF DEFENDANT IN INTEREST OR DUTY IN PERSON TO WHOM DEFAMATORY STATEMENT IS MADE.**—Defendants, who were rate payers of the parish, honestly and reasonably believing that the board of guardians were the proper authorities to whom to apply to secure an investigation, sent to them a letter containing defamatory matter concerning plaintiff, who was guardian of the poor. *Held*, the honest and reasonable belief that the board of guardians had an interest or duty in the subject-matter of the communication does not make the occasion privileged, if as a matter of fact they had no such interest or duty. *Hebditch v. MacLawsine et al.*, L. R. [1894] 2 Q. B. 54.

This decision is in accord with the famous definition laid down in *Harrison v. Bush*, 5 E. & B. 344, (which was not necessary for the decision in that case,) that a communication is privileged if made by a person having an interest or duty in the subject-matter to one "having a corresponding interest or duty." In *Waring v. M'Callin*, Ir. Rep. 7 C. L. 282, there is a dictum to the effect that the honest belief that a duty exists in the party to whom the statement is made, constitutes a privileged occasion, but that case is strongly disapproved of in the principal case. *Thompson v. Dashwood*, 11 Q. B. D. 43, which has already been discredited (Pollock on Torts, 2d edit., pp. 226, 245), is flatly overruled. In that case defendant wrote a letter containing defamatory matter intending to send it to a person to whom publication would have been privileged, and by mistake put it into the wrong envelope and sent it to another person. The defendant was not held liable. The fallacy in that decision is in the court's assuming the



letter to have been sent out on a privileged occasion. It is true the defendant intended to use a privileged occasion, and thought he was doing so, but he was not. It does not matter that the defendant did not intend to injure the plaintiff. *Curtis v. Mussey et al.*, 6 Gray, 261. The doctrine of the principal case, that the belief of defendant that the occasion is privileged does not make it privileged, harmonizes with the general rule that a mistake does not excuse. *Shepherd v. Whitaker* L. R. 10 C. P. 502; *Griebel v. Rochester Printing Co.*, 60 Hun, 319; *Mayne v. Fletcher*, 4 Man. & Ry. 311, 312, note; *Fox v. Broderick*, 14 Ir. C. L. R. 453, 459. But see *Hanson v. Globe Co.*, 159 Mass. 293. (Holmes, Morton, and Barker, JJ. *dissenting*.)

**TORTS — IMPUTED NEGLIGENCE.** — An infant twenty-two months old, being left by its mother, wandered on the track of the defendant, and was struck and injured by a train through the negligence of the defendant's train hands. *Held*, that a child of tender age is incapable of contributory negligence, and that in a suit by the child the negligence of the parent cannot be imputed to it. *Bottoms v. S. & R. Railroad Co.*, 19 S. E. Rep. 730 (N. C.).

This case adds North Carolina to the list of States which repudiate the doctrine of imputed negligence. The decision seems entirely sound. Whatever question exists where the suit is by the parent, in an action by the child for injuries received the doctrine is indefensible upon any theory.

**TORTS — MALICIOUS PROSECUTION.** — The plaintiff set out that he was arrested upon the complaint of the defendant; that the complaint was false and was known by the defendant to be false when he made it; that the complaint was made without probable cause and maliciously, with intent to injure the plaintiff; that when before the court upon this complaint, in consequence of false statements made by the defendant, that it would benefit the plaintiff to plead guilty, and would terminate the proceedings against him, and would release him from arrest and imprisonment to do so, believing these statements, under duress and threats of long imprisonment, and not knowing the consequences of his doing so, he formally pleaded guilty, though he was not guilty, as the defendant knew, and was sentenced to imprisonment, and imprisoned ten months. To this the defendant demurred. *Held*, that the plaintiff could recover. *Johnson v. Girdwood*, 28 N. Y. Supp. 251. See NOTES.

**TRUSTS — REMOVAL OF NON-RESIDENT TRUSTEE.** — The New York Code, § 263, subdivision 1, gives the superior city courts jurisdiction of any action to procure a judgment determining, annulling, or otherwise affecting an estate, title, or other interest in real property which is situated within the city where the court is located. *Held*, under this statute, that the courts of New York City have jurisdiction in an action to remove a trustee who resides outside the state, when the trust *res* is real estate in New York City. *Paget v. Stevens*, 28 N. Y. Supp. 549.

The dissenting opinion points out that an action for removal of a trustee is primarily an action *in personam*, to determine the right of defendant to exercise the privileges and enjoy the profits of his trusteeship, and would confine the operation of the statute to actions *in rem*. This would seem the better view.

**TRUST DEPOSIT — MONEY PAID TO A BANK FOR A SPECIFIC PURPOSE.** — The complainant gave money to a bank in payment of a note and took a receipt, which was to be given up when the note was returned. On the bank becoming insolvent without paying the note, *held*, that the complainant was entitled to have the assets in the hands of the receiver applied to the payment of the note. That the money was paid to the bank for a specific purpose, and it was not the understanding of the parties that the bank might use it for any other purpose. It made no difference that the complainant's money could not be identified. It was sufficient that it could be traced to the vaults of the bank. *Massey et al. v. Fisher*, 62 Fed. Rep. 958.

On principle it seems hard to make out a trust. It does not appear that the bank was expected to apply the money given by the complainant to the note. There is not much authority on the point, and what there is is conflicting.

**WILLS — ERRONEOUS DESCRIPTION.** — Testatrix devised the southeast quarter of a certain section, which quarter-section she did not own. The southwest quarter did belong to her, and the devisee claims this under the will. The will recited her ownership of the southeast quarter. *Held*, devisee can take the southwest quarter under this clause, as extrinsic evidence is admissible to identify the land devised (Kinne, J. *dissenting*). *Eckford v. Eckford*, 58 N. W. 1093 (Ia.)

This is the first time this question has arisen in Iowa, and the majority adopt the view of the majority in *Patch v. White*, 117 U. S. 20. This seems to be the better view. All extrinsic facts except direct declarations of intention can come in. See 6 HARV. LAW REV. 434, 10 Am. Law Reg., N. S. 93, and *Riggs v. Myers*, 20 Mo. 239. Opposed to this view are *Hurtz v. Hibner*, 55 Ill. 514, and 10 Am. Law Reg., N. S. 353.

## REVIEWS.

THE LAW OF EMINENT DOMAIN IN THE UNITED STATES. By Carman F. Randolph. Boston: Little, Brown, & Co. 1894. pp. cxxv, 462.

The name "Eminent Domain" comes from Grotius, and the subject is a prominent one with European writers on public law; but treatises about it do not exist outside of the United States. The topic develops here because it is a branch of our system of Constitutional Law. The first treatise was by H. E. Mills, of St. Louis, in 1879; of this a second edition appeared in 1888. In the last named year there came another much larger book, by John Lewis, of Chicago. The subject had been systematically dealt with in two elaborate articles, published in 1856, in Volume XIX. of the Boston Law Reporter; and of course it is often nowadays incidentally expounded in works on other subjects, — *e. g.* in Pierce's American Railroad Law and Angell and Ames on Corporations.

Mr. Randolph's book brings the subject well up to the present date. It is a compact, accurate, and scholarly piece of work. The author is no party to that widespread silent conspiracy between writers and publishers which palms off upon an abused profession so much worthless matter. There is no padding here; the writer has thought over his matter, and his thinking is his own. He has furnished his reader also with an unusually good apparatus of helps in his full indexes, his careful syllabus of the entire volume, and a collection of all the constitutional passages relating to his subject. While the book is smaller than that of Mills, it has a more thorough and scholarly treatment of the subject. In avoiding the wholly unnecessary bulk of Lewis's treatise, it steers clear also of the narrow, *doctrinaire* tone which did much to mar that book, — *e. g.* in its treatment of the topics of "Public Use" and "Taking." It may well be thought that Mr. Randolph carries too far the effort to widen the reach of the constitutional provisions, and excepts too readily the smoothly transmitted dicta of judges who in many cases have not sufficiently considered the nature and origin of the great topic they have in hand. But in this he has the example of his two predecessors. Both he and they may perhaps say that they are not making law, but only recording the law ascertained by the courts; yet one has only to recall the subtle skill of Blackburn in his treatise on Sale to perceive how much an author may do by a wise selection, analysis, and interpretation of the cases, and a close restriction of them to the exact point decided, towards placing the law upon a better footing. "Legislation," says our author of a certain topic, "both constitutional and statutory, has cleared or confused the situation according to the amount of legal sense behind it." He would probably think it unbecoming to say of judicial decisions what he says here of legislation; and yet as to many topics that thing ought to be plainly said. Many of the decisions on the subject of Eminent Domain are ill instructed and petty. To say that they declare the law for their own jurisdiction is to say much, when one is inquiring what the momentary law in that jurisdiction is; but it is to say comparatively little when the question is of that larger sort that concerns the jurist, and the lawyer who seeks to set his own feet on the rock of right principles and sound reason and to help place his subject there.

Mr. Randolph has fourteen chapters, treating successively of, I. The



Eminent Domain; II. Jurisdiction; III. The Public Use; IV. Property; V. The Authority to condemn; VI. Acquisition other than by Condemnation; VII. Interferences with Property in Furtherance of Public Purposes; VIII. Location and its Incidents; IX. The Estate or Interest condemned; X. Compensation and Damages; XI. Procedure; XII. Remedies; XIII. The Improvement and Use of Streets; XIV. Waters. Of these chapters the tenth is considerably the longest; the weighty topics of Chapters II. and IV. occupy together much less than the space given to Chapter X. While one is disposed to question sometimes the scientific neatness and proportion of the treatment, he must admit the simplicity and practical convenience of it.

As a convenient, compact, sober, and accurate book of reference for the practitioner, Mr. Randolph's book may be heartily commended.

J. B. T.

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COMMENTARIES ON THE LAW OF PERSONS AND PERSONAL PROPERTY. Being an Introduction to the Study of Contracts. By Theodore W. Dwight, late Professor of Law at Columbia College, New York. Edited by Edward F. Dwight, of the New York Bar. Boston: Little, Brown, & Co. 1894. 8vo. pp. lxii, 748.

One of Professor Dwight's students has said of him, that "he made everything so plain as he went, and he went so quickly, that the student might delude himself with the belief that our whole jurisprudence was innate in himself, and only awaited the awakening touch of the great teacher. He aroused and he riveted the attention of all to a degree that was very great, and wholly exceptional in a school-room. Strangest of all, his own interest in the work appeared to be as fresh and exuberant as that of any of his listeners." (7 HARV. LAW REV. 209.) After finding, as one does, that all Professor Dwight's students agree in praising him and his success with his methods of teaching, one naturally turns with a lively interest to his publication of his lectures (he left them ready for the printer) to see what hope it shows for their success in print.

In one thing, first of all, one finds the praise borne out. He does make everything thoroughly plain, and he gallops along through his subject without making it less plain by his speed; and thus he accomplishes a great deal. He treats of the sources of the law, the rights of persons as effected by infancy, marriage, and the like, and of all the vicissitudes of title and ownership, and on every page he makes one feel how he must have helped his students with the richness of his knowledge and experience. If he treats of the early love of the Colonies for old constitutional principles, such as Magna Charta, he clothes the dry bones with the bit from Evelyn's diary, where that gentleman was told that the Colonies "might be curbed by a few of his Majesty's first-rate frigates, and with a bit of the curious history of the document itself." And this comes in in the notes of the book—just as it probably came in by the way in the lectures—in such a manner that it enlivens the whole subject without destroying the rapid continuity of the full and substantial treatment of the rights of personal liberty. On the whole, Professor Dwight's book, while it may well fail in the opinion of those who knew him to come up to the lectures on which it is based, contains a great mass of information, never pedantic and never even uninteresting, and shows to those who have never known him many of the qualities which led to his phenomenal success as a teacher.

R. W. H.



CASES ON CONSTITUTIONAL LAW. Part III. With Notes by James Bradley Thayer, LL.D., Weld Professor of Law at Harvard University. Cambridge: Charles W. Sever. 1894. pp. x, 486 (945-1431).

This part is now out, and Part IV. is expected to be out in the early part of 1895. This contains valuable selections of cases and authorities on Eminent Domain and on Taxation. *Minot v. Winthrop*, the Massachusetts decision sustaining the collateral inheritance tax, makes its first appearance in print, from a certified copy, on page 1422. R. W. H.

DANIELL'S CHANCERY PLEADING AND PRACTICE. Sixth American Edition. By John M. Gould, Ph. D. Boston: Little, Brown, & Co. 1894. 3 vols. 8vo. pp. cxxxi, viii, xxxii, 2732.

BLISS ON CODE PLEADING. Third Edition. By E. F. Johnson, B. S. L. L. M. St. Paul: West Publishing Co. 1894. 8vo. pp. xxxv, 809.

In these two works are represented widely different methods of treatment, with different objects and ends in view. The Daniell, in response to the practitioner's demand, is ponderous, full, almost all-comprehensive in its nature; while the Bliss, as becomes a text-book for students, is simpler and less exhaustive, aiming to deal rather with the underlying principles than the minutæ of code law.

This fundamental distinction, moreover, is not less accentuated in the latest editions of these works than in the past. Three years of nearly constant research and investigation have been devoted, so it is stated, to the task of making this edition of Chancery Pleading complete and fully abreast of the times; and the result is evidenced by useful additions (forms, precedents, etc.), a vastly enlarged, perhaps exhaustive collection of new authorities, and a marked extension of the encyclopedic character of the work.

In the new edition of Bliss, on the other hand, a different task has been attempted, — *i. e.* to add to the value of the book for the purposes of the student rather than for those of the practising lawyer. To accomplish this a variety of means has been used: short, terse statements of principles have been placed before the sections discussing them, leading cases have been cited in the notes, new forms added, and topics of recent development considered and discussed.

Looked at from its own point of view, each new edition appears to have been faithful to the objects of its work, and not unsuccessful in carrying them into existence. D. A. E.

THE LAW OF EVIDENCE. By H. C. Underhill, LL. B. Chicago: T. H. Flood & Co. 1894. 8vo. pp. ccii, 567.

This is a brief treatise primarily intended for students. It follows the method and teachings of the leading text-books, but does not show any familiarity with the recent monographs and articles that have helped so much to give the rules of evidence their proper formulation. Such subjects as the parol evidence rule, the construction of written instruments, *res gestæ*, and the "best evidence" rule, receive brief and by no means

satisfactory treatment. It is but just to the author, however, to say that he purposely gives but little consideration to some of these questions, because they are so fully treated in the standard authorities. More careful attention is paid to subjects which have come into prominence within recent years, as a result of our rapid and immense advance in the arts and sciences. The application of newly discovered scientific principles to every-day affairs, and the extensive use of machinery for transportation and manufactures, have not been without influence on the law of evidence, and the author endeavors to show what it has been. The comparatively recent statutory changes, such as those which affect the competency of witnesses and their privileges, have also received the full consideration their importance to-day demands.

F. B. W.

**THE LAW OF THE APOTHECARY.** A Compendium of both the Common and Statutory Law governing Druggists and Chemists in New England. By George Howard Fall, LL.B., Ph.D. Lectures on Roman Law in the Boston University Law School. Boston: Irving P. Fox. [1894?] 8vo. pp. 153, vii.

From one point of view it is desirable that the statutory and common law regulation of members of any trade or profession should be made intelligible and brought home to them; but no layman's manual of the law will ever enable those who read it "to glean from it a clear idea of the . . . law," as the author hopes in his Preface that this may do; and it would probably be impossible to prevent a layman from occasionally relying to his damage on such a book. This seems nowhere to contain any hint to apothecaries that there is a point beyond which "the man who is his own lawyer has a fool for a client." If a layman's use of it can be limited to the more certain branches, it will serve an excellent purpose; but a druggist who assumed — as a druggist fairly might assume from the statement on page 10 — that his responsibility for the purity of his drugs was limited to the patronizing of a responsible wholesale dealer might get into trouble.

R. W. H.

**OUTLINE STUDY OF LAW.** By Isaac Franklin Russell, D. C. L., LL.D., Professor in the University of the City of New York. New York: L. K. Strouse & Co. 1894. pp. xiv, 280.

This is an exceptionally good little first book of law, meant apparently, and well suited, for use before the serious study of law is begun. It has, in the form of lectures, as the Preface tells us, been so used with success. The author has succeeded especially well in the definition of the general nature of law, and in the consistent application of his definition. Having neatly pointed out that law is not command, but custom, he makes one feel it when he treats of the limitations of an artificial conception like "consideration" for contracts, as well as when he describes the growth and commercial application of the law of Insurance. The book may safely be recommended to those who want to begin at law and see what it is like.

R. W. H.

THE AMERICAN DIGEST. ANNUAL. 1894. (September 1, 1893, to August 31, 1894.) Prepared by the Editorial Staff of the National Reporter System. St. Paul, Minn.: West Publishing Co. Oct. 1894.

A most desirable tendency towards brevity in this Digest is worth noticing. 1892 had cols. 6046; 1893 had cols. 5715; this has cols. 5432. There is still room for improvement. Probably it is hard not to be prolix in work done in such haste as this, and much will be excused by many of the profession for the sake of having a year's law digested within two months of the last case.

R. W. H.





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## SOVEREIGNTY IN ENGLISH LAW.<sup>1</sup>

ACCORDING to modern law and practice there is no doubt that Parliament, or, to speak more technically, the Queen in Parliament, is sovereign in England, and no other person or body has the attributes of sovereignty. "The one fundamental dogma of English constitutional law is the absolute legislative sovereignty or despotism of the King in Parliament."<sup>2</sup> That is to say, Parliament is the one authority capable of making, declaring, and amending the law of England without reference to any other authority and without any legal limit to its own power. Ever since there has been an English monarchy it has been understood that the King had powers of legislation, and that they ought not to be exercised without advice.<sup>3</sup> From the thirteenth century onwards it was understood, in particular, that new taxes could not be imposed without the consent of Parliament, but other points long remained vague. In later times it has been definitely settled that the only competent advice and consent for all legislative purposes are those of the Lords spiritual and temporal and Commons in Parliament assembled. Later still it has become an undisputed

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<sup>1</sup> From a work in preparation, founded on lectures delivered at Oxford.

<sup>2</sup> Dicey on the Law of the Constitution, 4th ed., 1893, p. 136.

<sup>3</sup> "Leges namque Anglicanas licet non scriptas leges appellari non videtur absurdum . . . eas scilicet quas super dubiis in consilio definiendis, procerum quidem consilio et principis precedente auctoritate, constat esse promulgatas."—Glanvill, Prol.

proposition that no bounds can be assigned in point of law to the legislative power exercised with that authority.

The earliest definite statement of the modern doctrine appears to be Sir Thomas Smith's in his "Commonwealth of England," written, as the book itself states,<sup>1</sup> in 1565, and intended mainly for the use of Continental readers.<sup>2</sup> The book was, however, first published in 1583.

"The most high and absolute power of the Realm of England consisteth in the Parliament. . . . That which is done by this consent is called firm, stable, and *sanctum*, and is taken for law. The Parliament abrogateth old laws, maketh new, giveth order for things past and for things hereafter to be followed, changeth right and possessions of private men, legitimateth bastards, establisheth forms of religion, altereth weights and measures, giveth form of succession to the Crown, defineth of doubtful rights whereof is no law already made, appointeth subsidies, tailes, taxes, and impositions, giveth most free pardons and absolutions, restoreth in blood and name, as the highest court condemneth or absolveth them whom the prince will put to trial. And to be short, all that ever the people of Rome might do either *Centuriatis Comitibus* or *Tributis*, the same may be done by the Parliament of England, which representeth and hath the power of the whole Realm, both the head and body. For every Englishman is intended to be there present either in person or by procurator and attorney, of what pre-eminence, state, dignity, or quality soever he be, from the Prince (be he King or Queen) to the lowest person of England. And the consent of the Parliament is taken to be every man's consent."<sup>3</sup>

Here we have the first exposition by any English writer, if not by any European one, of the notion of sovereignty in its modern amplitude. Almost simultaneously Bodin, writing in France, defined "majestas" to the same effect, and argued, as Hobbes did afterwards, that in England sovereignty belonged to the King alone. It may well be supposed that Sir Thomas Smith, while he was employed as Ambassador to the French Court, had Bodin's work in some way communicated to him, although it was not actually published before 1577, in which year Smith died. Apparently Sir Thomas Smith was anxious both to make it clear to French-

<sup>1</sup> *Ad fin.*

<sup>2</sup> Learned persons resorting to England seem to have used it as a kind of guide-book. See the Elzevir edition of the Latin text, 1641, furnished with an itinerary and other matter to the same purpose.

<sup>3</sup> T. Smith, *Commonwealth of England*, Book 2, ch. 2.



men that the King of England was not absolute, and to ascribe to Parliament at least as much authority as any Frenchman could ascribe to the King of France. It must be remembered that Sir Thomas Smith, who was the first Regius Professor of Civil Law at Cambridge, was not a common lawyer, but a civilian. He was familiar with the Roman adage *Quod principi placuit legis habet vigorem*, and was determined, it seems, to show his Continental colleagues in Roman learning that we had as good a sovereign as any of theirs. He saw the importance of the point as clearly as Hobbes did seventy years later, and, using his insight with greater political wisdom, boldly put, not the King alone, but the King in Parliament, in the place of the Roman Emperor. In this he was somewhat before his age. His view is amply justified by all modern constitutional writers. Blackstone expressly declares that the sovereignty of the British constitution is lodged in Parliament,<sup>1</sup> and that it is the place where that absolute despotic power which must in all governments reside somewhere is intrusted by the constitution of these kingdoms; after which he almost repeats Sir Thomas Smith's language.<sup>2</sup> But in Sir Thomas Smith's own time the sages of the Common Law would hardly have agreed with him. Their opinion seems to have been that not only the King was subject to the law, but the law was in some way above Parliament. Some fundamental principles of law and justice, never defined but generically described as "common right," were sacred against the legislature, and if Parliament were to transgress them it would be the right and the duty of the judges to pay no attention to such enactments.

Coke enounced this opinion with his usual vehemence, and even more than his usual inaccuracy or disingenuousness in reading his own particular opinion into the authorities on which he professed to rely.<sup>3</sup> He found, as will appear below, nominal fol-

<sup>1</sup> Comm. i. 51.

<sup>2</sup> Ibid. 160, 161.

<sup>3</sup> Bonham's Case, 8 Rep. 118a: "It appears in our books that in many cases the common law will control Acts of Parliament and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such act to be void; and therefore in 8 Ed. III. 30 . . . Herle saith some statutes *are made against law and right*, which those who made them perceiving, would not put them in execution." The italicized words are a mere gloss of Coke's own. What Herle did say, as reported, is, "Ils sont ascuns statutes faitz que celuy mesme qui les fist ne les voleit pas mettre en fait." Plenty of modern statutes have been inoperative in practice, not because the common law controlled them, but because they were in fact unworkable.

lowers down to the eighteenth century. Blackstone, however, while in one place he makes a nominal concession to the "law of nature," uses quite other language when he comes to the practical side of English institutions. He denies in particular what he has seemed to admit in general; he will hear nothing of any human authority being empowered to control the Parliament of Great Britain, and explains away the sayings of his predecessors as meaning only that Acts of Parliament are to be construed in a reasonable sense if possible. It is worth while to compare the passages.

"It [the law of nature] is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this."<sup>1</sup>

"Acts of Parliament that are impossible to be performed are of no validity; and if there arise out of them collaterally any absurd consequences, manifestly contradictory to common reason, they are, with regard to those collateral consequences, void. I lay down the rule with these restrictions; though I know it is generally laid down more largely, that Acts of Parliament contrary to reason are void. But if the Parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution that is vested with authority to control it: and the examples usually alleged in support of this sense of the rule do none of them prove that where the main object of a statute is unreasonable the judges are at liberty to reject it; for that were to set the judicial power above that of the legislature, which would be subversive of all government."<sup>2</sup>

"True it is that what the Parliament doth, no authority upon earth can undo."<sup>3</sup>

No case is known, in fact, in which an English court of justice has openly taken on itself to overrule or disregard the plain meaning of an Act of Parliament. The example given for illustration's sake is that an Act making a man judge in his own cause would be void. Thus Hold said:—

"If an Act of Parliament should ordain that the same person should be party and judge, or, which is the same thing, judge in his own cause, it would be a void Act of Parliament; for it is impossible that one should be judge and party, for the judge is to determine between party and party, or between the government and the party; and an Act of Parliament can do no wrong, though it may do several things that look pretty odd."<sup>4</sup>

<sup>1</sup> Comm. i. 41.

<sup>2</sup> Ibid. i. 91.

<sup>3</sup> Ibid. i. 161.

<sup>4</sup> City of London v. Wood, 12 Mod. 687.

But this opinion has never been acted upon; and indeed the example is not wholly fortunate, for the settled rule of law is that although a judge had better not, if it can be avoided, take part in the decision of a case in which he has any personal interest, yet he not only may but must do so if the case cannot be heard otherwise. Nowadays the objection of personal interest in the judge commonly presents itself in the form of the judge being a shareholder (for his own behoof or as trustee) in some railway or other public company whose matters are before him; and it is also commonly waived by the parties.<sup>1</sup>

It is now quite well understood that the judges will not discuss the validity of an Act of Parliament. They will not even entertain allegations that a private Act was obtained by fraud or improper practices. If Parliament has been deceived, the remedy is with Parliament alone. Within our own time the late Mr. Justice Willes, a great master of the Common Law, and always ready on fitting occasions to maintain the dignity of the law and its officers, laid this down in the plainest terms. An attempt had been made to found an argument on the suggestion that a local railway company's Acts had been obtained, in effect, by a fraud on Parliament.

"It is further urged," said Willes, J., "that the company is a mere non-entity, and there never were any shares or shareholders. That resolves itself into this, that Parliament was induced by fraudulent recitals to pass the Act which formed the company. I would observe, as to these Acts of Parliament, that they are the law of this land; and we do not sit here as a court of appeal from Parliament. It was once said—I think in Hobart<sup>2</sup>—that, if an Act of Parliament were to create a man judge in his own case, the court might disregard it. That dictum, however, stands as a warning, rather than an authority to be followed. We sit here as servants of the Queen and the legislature. Are we to act as regents over what is done by Parliament with the consent of the Queen, Lords, and Commons? I deny that any such authority exists. If an Act of Parliament has been obtained improperly, it is for the legislature to correct it by repealing it: but, so long as it exists as law, the court are bound to obey it. The proceedings here are judicial, not autocratic,

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<sup>1</sup> For a reported example see *Reedie v. L. & N. W. R. Co.* (1849), 4 Ex. 244, 20 L. J. Ex. 65, where Parke, B. stated that, being interested in the defendant company, he took part in the case only at the request of counsel on both sides.

<sup>2</sup> In *Day v. Savadge*, Hob. 87: "Even an Act of Parliament made against natural equity, as, to make a man judge in his own case, is void in itself; for *jura naturæ sunt immutabilia*, and they are *leges legum*."



which they would be if we could make laws instead of administering them."<sup>1</sup>

The sovereignty of Parliament being undisputed, we have to bear in mind exactly what we understand by it for an English lawyer's purposes. No power less than the Queen in Parliament is sovereign, for that is the only power which can issue supreme and uncontrolled legal commands. Parliament as a whole, and Parliament alone, can make and alter the law of the land without reference to any other authority. Moreover, we are not concerned, as students of the sources of English law in general, with the manner in which the action of the supreme legislature is determined. As matter of form, this belongs to the special study of the English constitution and of the law and practice of Parliament. As matter of substance, the consideration of political power, of its practical seat and ultimate sources, would take us out of the field of jurisprudence proper, and into that of politics and constitutional history. It is now generally recognized that the majority of the House of Commons has and exercises, for all substantial intents, political supremacy in these kingdoms. It cannot directly govern at all; it cannot legislate without the concurrence of the House of Lords and the Crown. The Crown, however, can act only on the advice of Ministers, and the Ministers of the Crown are chosen from the party which commands a majority in the House of Commons. That majority, so long as it holds together, can cause its will to be observed, on the whole, in every department of government. Or, to put the same thing in a negative form which is perhaps more accurate, it is not possible for the government of the United Kingdom to be carried on by any lawful means in continuous opposition to the majority of the House of Commons. But this does not touch the doctrine of legal sovereignty. The power which can ultimately determine the bent of legislation, or control the execution of existing laws, but cannot itself legislate, is not a legal but a political power. Now the majority of the House of Commons, as we said, does not govern or legislate. The House of Commons itself has no power whatever of issuing any direct legal commands except so far as it can do so for the purpose of regulating its own procedure and discipline, and enforcing its own privileges. It may practically make a statute inoperative by refus-

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<sup>1</sup> *Lee v. Bude & Torrington Ry. Co.* (1871), L. R. 6 C. P. 582.

ing to vote the supplies necessary for putting the statute in execution (a thing which has been known to happen), but it cannot alter one letter of the text. This is not what we understand by sovereignty in the legal sense.

It has been said by one or two modern writers that the electors who return members to the House of Commons are sovereign. This involves a still greater confusion of thought than attributing sovereignty to the House of Commons when elected. The persons chosen by the voters at a general election will certainly form that part of the legislature in which the controlling political power resides. But that, as we have seen, does not make them sovereign, much less does it make the electors sovereign. In fact the electors are not legislators or anything like legislators. They have not the power of issuing any legal commands at all. An identical resolution passed by the electors of every constituency in England, or a large majority of the constituencies, at the time of a general election or at any other time, might be a very notable political event. But it would certainly have no legal force whatever. It would create no kind of legal authority, justification or excuse, and no court of justice would be entitled (much less bound) to pay any attention to it. As Cornewall Lewis long ago rightly said, "The right of voting for the election of one who is to possess a share of the sovereignty is itself no more a share of the sovereignty than the right of publishing a political treatise or a political newspaper."<sup>1</sup>

Although the whole theory of sovereignty is modern, and in fact could not have been definitely held or expressed before the principal states of modern Europe had acquired a strong and consolidated government, writers on the philosophy of law and politics have readily fallen into the way of assuming that civilized government cannot exist, or can exist only in an imperfect manner, unless there is some definite body in the state to which sovereignty can be attributed. Thus Blackstone<sup>2</sup> says: —

"However they [existing forms of government] began, or by what right soever they subsist, there is and must be in all of them a supreme, irresistible, absolute, uncontrolled authority, in which the *jura summa imperii* or the rights of sovereignty reside."

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<sup>1</sup> Remarks on the Use and Abuse of some Political Terms, London, 1832, p. 43.

<sup>2</sup> Comm. i. 49.

Blackstone's language is well enough suited to the facts that can be observed in the longitude of Oxford or of Paris, and it probably did not occur to him to look much farther. Even in Blackstone's time, however, there might have been some trouble in discovering the *jura summa imperii* in the constitution of the Holy Roman Empire, which was then living in a decrepit old age, but living still. In our own time, if we extend our view eastward to Bern, or as far west as Washington or Ottawa, we may find reason to think that Blackstone laid down the supposed necessity of an absolute uncontrolled authority in terms altogether too peremptory and universal. It would not be appropriate here to enter on the problems, whether legal or political, that are raised by the institutions of federal governments like those of the United States and Switzerland, and in a less complicated degree by those of countries where, as in the Netherlands, or an individual American State within the Union, such as the Commonwealth of Massachusetts or the State of Illinois, the constitution is in fact defined by a fundamental written instrument, and the terms of that instrument cannot be altered by the process of ordinary legislation. In all such cases the ordinary legislative body is in a position much like that of the legislature in a self-governing British colony. We can hardly say that it is in no sense sovereign, for within the bounds of its competence it knows no human superior. But since its competence has assigned and known bonds, we cannot attribute sovereignty to it in the same sense in which sovereignty is attributed to the British Parliament. Where there is a *rigid* constitution, to use the convenient term introduced by Mr. Bryce and Mr. Dicey,<sup>1</sup> there cannot be any one body in permanent existence or habitual activity which possesses unlimited sovereignty. The nearest approach to Parliamentary sovereignty as we have it in England must be sought, in every such case, wherever the ultimate power of altering the written constitution is placed by the constitution itself. In the United States, for example, this amending power is exercisable only with the consent of three fourths of the States expressed either by their legislatures or in special conventions, and moreover no State can be deprived of its equal suffrage in the

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<sup>1</sup> A. V. Dicey, *The Law of the Constitution*. Mr. Dicey is, I believe, the first writer who has clearly pointed out that the vital difference is not between federal and centralized governments. It is true that a federal constitution must be rigid, or it will not be truly federal. But a non-federal State may equally well have a rigid constitution, though it need not; and many, probably the majority, have.



Senate without its own consent.<sup>1</sup> The English doctrine of absolute sovereignty is not capable of being usefully applied to constitutions of this type. In fact it is a generalization from the "omnipotence" of the British Parliament, an attribute which has been the offspring of our peculiar history, and may quite possibly suffer some considerable change within times not far distant. Such a constitution as that of the United States or of Switzerland may be said to give a definite meaning to the sovereignty of the people, as opposed to the power or caprice of transitory majorities.

*Frederick Pollock.*

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<sup>1</sup> Const. of U. S., Art. V.

## PAROL CONTRACTS PRIOR TO ASSUMPSIT.

IT is generally agreed by the Continental writers that in early German law, from which our law comes, only real and formal contracts were binding. The same is unquestionably true of the English common law from the time of Edward III. to the introduction of Assumpsit towards the end of the fifteenth century. But Mr. Justice Holmes in his Common Law, 260-264, and again in his essay on Early English Equity, 1 L. Q. Rev. 171-173, endeavors to show that the rule requiring a *quid pro quo* for the validity of a parol undertaking was not of universal application in England, and that a surety, in particular, might bind himself without a specialty prior to the reign of Edward III. If this opinion is well-founded, an innovation and the abolition of the innovation must be accounted for. The evidence in favor of the validity during the two centuries following the Norman Conquest, of any parol obligation which was neither based upon a *quid pro quo*, nor assumed in a court of record, should, therefore, be very strong to carry conviction. The evidence thus far adduced has failed to convince the present writer.

Prior to the appearance of Assumpsit the contractual remedies in English law were Debt, Detinue, Account, and Covenant. Detinue and Account, every one will agree, were based upon real contracts. Covenant lay only upon sealed instruments, that is, formal contracts. If, therefore, parol undertakings, other than real contracts, were ever recognized in early English law they must have been enforced by the action of Debt. But no instance of such an action in the royal courts, it is believed, can be found.

Glanvil, Bracton, and Britton all recognize the validity of debts founded upon a specialty.<sup>1</sup> Glanvil also says in one place that no proof is admissible in the king's court, if the plaintiff relies solely upon *fidei læsio*; and in another that the king's court does not enforce "*privatas conventiones de rebus dandis vel accipiendis in*

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<sup>1</sup> Glanvil, Lib. X. c. 12. "De debitjs laicorum quae debentur . . . de cartis debita continentibus." Bracton, f. 100, b. "Per scripturam vero obligatur quis, ut si quis scripserit alicui se debere, sive pecunia numerata sit sive non, obligatur ex scriptura, nec habebit exceptionem pecuniae non numeratae contra scripturam, quia scripsit se debere." 1 Nich. Britton, 157, 162.

vadium vel alias hujusmodi," unless made in that court, that is to say, unless they were contracts of record.<sup>1</sup> Bracton makes the statement that the king's court does not concern itself except occasionally *de gratia* with "stipulationes conventionales," which may be infinite in their variety.<sup>2</sup> The language of Fleta is most explicit against the validity of formless parol promises. "Oportet igitur ex hoc quod aliquis ex promissione teneatur ad solutionem, quod scriptura modum continens obligationis interveniat, nisi promissio illa in loco recordum habenti recognoscatur. Et non solum sufficiet scriptura, nisi sigilli munimine stipulantis roboretur cum testimonio fide dignorum." The same principle was expressed a few years later in a case in Y. B. 3 Ed. II. 78. The plaintiff counted in Debt on a grant for £200, showing a specialty as to £140, and offering suit as to the rest. Frisk, for defendant, said: "Every grant and every demand by reason of grant must be by specialty, but of other contracts,<sup>3</sup> as of bailment or loan, one may demand by suit. Therefore as you demand this debt by reason of grant and show no specialty but of part, judgment," etc. The plaintiff

<sup>1</sup> Glanvil. Lib. X. c. 12, and c. 18.

<sup>2</sup> Bracton, f. 100, a. As there are several cases in Bracton's Note Book, in which the validity of covenants affecting land are assumed to be valid, Bracton, in the passage just referred to, probably had in mind miscellaneous covenants. See Pollock, Contracts (6 ed.), 136. It is certainly true that the rule that any promise under seal may give rise to an action was a comparatively late development in the history of covenant. As late as the middle of the fourteenth century, Sharshull, J., said in Y. B. 21 Ed. III. 7-20: "If he granted to you to be with you at your love-day, and afterwards would not come, perhaps you might have had a writ of covenant against him if you had a specialty to prove your claim."

<sup>3</sup> The word contract was used in the time of the Year Books in a much narrower sense than that of to-day. It was applied only to those transactions where the duty arose from the receipt of a *quid pro quo*, e. g., a sale or loan. In other words, contract meant what we now mean by "real contract." What we now call the formal or specialty contract was anciently described as a grant, an obligation, a covenant, but not as a contract. See, in addition to the authorities cited in the text, Y. B. 17 Ed. III. 48-14. A count in debt demanding "part by obligation and part by contract." Y. B. 29 Ed. III. 25, 26, "Now you have founded wholly upon the grant, which cannot be maintained without a specialty, for it lies wholly in parol, and there is no mention of a preceding contract." Y. B. 41 Ed. III. 7-15. Thorp, C. J.: "You say truly if he put forward an obligation of the debt, but if you count upon a contract without obligation, as here (a loan), it is a good plea." Y. B. 43 Ed. III. 2-5. Debt on a judgment. *Belknap* objected "for there is no contract or covenant between them." 8 Rich. II. Bellewe (ed. 1869), 32, 111. "In debt upon contract the plaintiff shall shew in his count for what cause the defendant became his debtor. Otherwise in debt upon obligation." Y. B. 11 Hen. IV. 73, a-11; 19 Rich. II. Bellewe (ed. 1869), 32, 111; Y. B. 39 Hen. VI. 34-44; *Sharington v. Strotton*, Plowd. 298, 301, 302; Co. Lit. 292 b. The fanciful etymology given in Co. Lit. 47 b should be added: "In every contract there must be *quid pro quo* for *contractus est quasi actus contra actum*."



was nonsuited. In Y. B. 2 Ed. III. 4-5, Aldeburgh (Judge of C. B. four years later) said: "If one binds oneself to another in a debt in presence of people 'sans cause et sans especialtie,' never shall an action arise from this." The same doctrine is repeated in later cases in the fourteenth century.<sup>1</sup> In the light of these authorities it seems highly improbable that Debt was ever maintainable in the king's court, unless the plaintiff could show either a specialty or a *quid pro quo* received by the defendant.<sup>2</sup>

In the essay upon "Early English Equity," already referred to, the distinguished writer makes the further suggestion that, although the formless parol undertakings ultimately failed of recognition in the King's Courts, the Church for a long time, with varying success, claimed a general jurisdiction in cases of *læsio fidei*; and that after the Church was finally cut down to marriages and wills, the clerical Chancellors asserted for a time in Chancery the power of enforcing parol agreements, for which the ordinary King's courts afforded no remedy. It is believed that undue importance has been attached to the proceedings in the spiritual court for *læsio fidei*. It is doubtless true that this court was eager to enlarge its jurisdiction, and to deal with cases of breach of faith not properly within its cognizance. We may also concede that the court was sometimes successful in keeping control of such cases when the defendant did not dispute the jurisdiction. But the authorities would seem to make it clear that from the time of the Constitutions of Clarendon, a prohibition would issue as a matter of course from the King's Court upon the application of one who was drawn into the spiritual court upon breach of faith in a purely temporal matter.<sup>3</sup>

<sup>1</sup> Y. B. 11 & 12 Ed. III. 587; Y. B. 18 Ed. III. 13-7; Y. B. 44 Ed. III. 21, 23; Y. B. 9 Hen. V. 14-23. The only statement in the Year Books to the contrary is the *dictum* of Candish, J., in 48 Ed. III. 6-11: "And also this action of covenant of necessity is maintainable because for so slight a thing one cannot always have his clerk to make a specialty." The case in Y. B. 7 Ed. II. 242 can hardly be said to throw any light upon the question under discussion.

<sup>2</sup> By the custom of London and Bristol, Debt was allowed upon a parol grant without *quid pro quo*. Y. B. 43 Ed. III. 11-1; Y. B. 14 Hen. IV. 26-13; Y. B. 22 Ed. IV. 2-6; F. M. v. R. C., 1 M. & G. 6 n. (a.); Y. B. 38 Hen. VI. 29-12; Y. B. 1 Hen. VII. 22-12; Williams v. Gibbs, 5 A. & E. 208; Bruce v. Waite, 1 M. & G. 1, and cases cited in Pollock, Cont. (6 ed.), 138 n. (p.). See also the cases of parol undertakings in the Bishop of Ely's Court, 4 Seld. Socy. 114-118.

<sup>3</sup> Constitutions of Clarendon, c. 15, Stubbs, Sel. Chart. 134; Glanvil, Book X. c. 12; Abb. Pl. 31, col. 1, rot. 21 (1200); 2 Br. N. B. No. 50 (1219); Fitz. Abr. Prohib. 15 (1220); 2 Br. N. B. No. 1893 (1227); Stat. Circumspecte Agatis, 13 Ed. I.; Y. B. 22 Lib. Ass. 70; Y. B. 2 Hen. IV. 10-45; Y. B. 11 Hen. IV. 88-40; Y. B. 38 Hen. VI. 29-

Nor has the present writer been able to discover any traceable connection between the ecclesiastical claim of jurisdiction over *læsio fidei* and the jurisdiction of the Chancellor in the matter of parol agreements. If the Chancellor proceeded in the same spirit as the ecclesiastical judge, purely upon the ground of breach of faith, it would follow that in the absence of a remedy at common law, equity would give relief upon any and all agreements, even upon gratuitous parol promises. And Mr. Justice Holmes seems to have so interpreted the following statement, which he cites from the Diversity of Courts (Chancery): "A man shall have remedy in Chancery for covenants made without specialty, if the party have sufficient witness to prove the covenants, and yet he is without remedy at the common law;" for he adds that the contrary was soon afterwards decided, citing Cary, 7: "Upon *nudum pactum* there ought to be no more help in Chancery than there is at the common law." But, with all deference, the passage in the Diversity of Courts seems to have been misapprehended. There is really no contrariety between that passage and the extract from Cary. It is not asserted in the Diversity of Courts that one should have remedy for *all* parol covenants, where there was no remedy at common law. Full effect is given to the language used if it is taken to import that relief was given upon *some* parol covenants. So interpreted the Diversity of Courts accords with other authorities. For while it is confidently submitted that no instance can be found prior to the time of Lord Eldon<sup>1</sup> in which Equity gave relief upon a gratuitous parol promise, it is certainly true that Chancery did in some cases furnish a remedy upon parol covenants. But in all these Chancery cases it will be found that the promisee, acting in reliance upon the promise, had incurred expense, or otherwise parted with property, and that the Chancellor, upon an obvious principle of natural justice, compelled the promisor to make reparation for the loss caused by

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11; Y. B. 20 Ed. IV. 10-9; Y. B. 22 Ed. IV. 20-47; Y. B. 12 Hen. VII. 22, b-2; Dr. & St. Dial. II. c. 24.

<sup>1</sup> At the present day a gratuitous undertaking by the owner of property to hold the same in trust for another is enforced in equity. It is a singular fact that this anomalous doctrine seems to have been first sanctioned by the conservative Lord Eldon, in *Ex parte Pye*, 18 Ves. 140. It was well settled that a use could not be created by a similar gratuitous parol declaration. Indeed, as late as 1855, Lord Cranworth, in *Scales v. Maude*, 6 D. M. & G. 43, 51, said that a mere declaration of trust by the owner of property in favor of a volunteer was inoperative. In *Jones v. Lock*, 1 Ch. Ap. 25, 28, he corrected this statement, yielding to the authority of what seemed to him unfortunate decisions.



his breach of promise. Three such instances, between 1377 and 1468, are mentioned in an essay upon "The History of Assumpsit," in an earlier volume of the REVIEW.<sup>1</sup> Those instances might have been supplemented by three similar cases which were brought to light by Mr. S. R. Bird.<sup>2</sup> In *Gardyn v. Keche* (1452-1454), Margaret and Alice Gardyn v. Keche promised to pay the defendant £22, who on his part was to take Alice to wife. The defendant, after receiving the £22, "meaning but craft and disceyt," married another woman, "to the great disceyt of the said suppliants, and ageyne all good reason and conscience." The defendant was compelled to answer the bill. In *Leinster v. Narborough* (circa 1480), the defendant being betrothed to the plaintiff's daughter-in-law, but desiring to go to Padua to study law, requested the plaintiff to maintain his *fiancée*, and a maid-servant to attend upon her during his absence, and promised to repay upon his return all costs and charges incurred by the plaintiff in that behalf. The defendant returning after ten years declined to fulfil his promise, and the plaintiff filed his bill for reimbursement, and was successful.<sup>3</sup> In *James v. Morgan* (1504-1515), the defendant promised the plaintiff 100 marks if he would marry his daughter Elizabeth. The plaintiff accordingly "resorted to the said Elizabeth to his great costs and charges," and "thorow the desavebull comfode" of the defendant and his daughter delivered to the latter jewels, ribbons, and many other small tokens. Elizabeth having married another man through the "crafty and false meane" of the defendant, the plaintiff by his bill sought to recover the value of his tokens, and also the "gret costs and charges thorow his manyfold journeys."

In all these cases there was, it is true, a breach of promise. But there seems to be no reason to suppose that the Chancellors, in giving relief, were influenced, even unconsciously, by any recollection of ecclesiastical traditions in regard to *læsio fidei*. It was so obviously just that one who had intentionally misled another to his detriment should make good the loss, that we need not go further afield for an explanation of the Chancellor's readiness to give a remedy upon such parol agreements. In A little Treatise concerning Writs of Subpoena,<sup>4</sup> written shortly after 1523, — that

<sup>1</sup> 2 HARV. LAW REV., 14, 15.

<sup>2</sup> The Antiquary, Vol. IV. p. 185, reprinted in part in 3 Green Bag, 3.

<sup>3</sup> The Antiquary, Vol. V. p. 38.

<sup>4</sup> Doct. & St. (18th ed.), Appendix. 17; Harg. L. Tr. 334.



is, at about the same time as the Diversity of Courts, — occurs the following instructive passage: —

“There is a maxim in the law that a rent, a common, annuity, and such other things as lie not in manual occupation, may not have commencement, nor be granted to none other without writing. And thereupon it followeth, that if a man for a certain sum of money sell another forty pounds of rent yearly, to be perceived of his lands in D, &c., and the buyer, thinking that the bargain is sufficient, asketh none other, and after he demandeth the rent, and it is denied him, in this case he hath no remedy at the common law for lack of a deed; and therefore inasmuch as he that sold the rent hath *quid pro quo*, the buyer shall be helped by a subpœna. But if that grant had been made by his mere motion, without any recompense, then he to whom the rent was granted should neither have had remedy by the common law nor by subpœna. But if he that made the sale of the rent had gone farther, and said that he, before a certain day, would make a sufficient grant of the rent, and after refused to do it, there an action upon the case should lie against him at the common law; but if he made no such promise at the making of the contract, then he that bought the rent hath no remedy but by subpœna, as it is said before.”

Here the subpœna is allowed in the absence of a promise. There could, therefore, be no question of breach of faith. But the money having been paid and received under the expectation of both parties that the plaintiff would get a valid transfer of the rent, it was plainly just that equity should not permit the defendant to rely on the absence of a remedy at common law as a means of enriching himself at the expense of the plaintiff.

It is hardly necessary to remind the learned reader of the analogy between the case just considered, and uses arising upon a bargain and sale, which were supported for the first time only a few years before.<sup>1</sup> It was doubtless the same principle of preventing unjust enrichment which led the Chancellor in the reign of Henry V. to give a legal sanction to the duty of the feoffee to uses which before that time had been a purely honorary obligation.

To sum up, then, the Ecclesiastical Court had no jurisdiction over agreements relating to temporal matters. Chancery gave relief upon parol agreements only upon the ground of compelling reparation for what was regarded as a tort to the plaintiff, or upon the principle of preventing the unjust enrichment of the defendant;

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<sup>1</sup> Y. B. 21 Hen. VII. 18-30.

and the common law, prior to Assumpsit, recognized only those parol contracts which were based upon a *quid pro quo*.

The jurisdiction of Equity was rarely invoked upon breaches of promises after the development of Assumpsit, unless specific performance of the contract was desired. We have only to consider, therefore, the nature of the common-law real contracts which were enforced by the actions of Debt, Detinue, and Account.

It is not necessary to deal specially with Account, since the essential principles of that action have been clearly and fully set forth by Professor Langdell in the second volume of this REVIEW.<sup>1</sup> It will suffice to emphasize the fact that a defendant's duty to account, whether as bailiff or receiver, arose from his receipt of property as a trustee, and that a plaintiff entitled to an account was strictly a *cestui que trust*. In other words, trusts for the payment of money were enforced at common law long before Chancery gave effect to trusts of land. It need not surprise us, therefore, to find that upon the delivery of money by A to B to the use of C, or to be delivered to C, C might maintain an action of Account against B.<sup>2</sup> Account against a receiver was long ago superseded by the common count for money had and received by the defendant to the use of the plaintiff. But the words "to the use of" still bear witness to the trust relation.

Detinue was usually founded upon the contract of bailment. This contract was a real contract by reason of the delivery of a chattel by the bailor to the bailee. The duty of the bailee was commonly to redeliver the same chattel to the bailor, either upon demand or at some time fixed by the terms of the bailment. But the chattel might be delivered to the bailee to be delivered to a third person, in which case the third person was allowed to maintain Detinue against the bailee.<sup>3</sup>

Detinue would also lie against a seller upon a bargain and sale. Here it was the payment of the purchase-money that as a rule

<sup>1</sup> Pages 242-257. See also Pollock, *Cont.* (6th ed.), 137, and the observations of the same writer in 6 HARV. LAW REV., 401, 402.

<sup>2</sup> (32 Ed. III.) Fitz. Ab. Acct. 108; (2 Rich. II.) Bellewe Acct. 7; Y. B. 41 Ed. III. 10-5; Y. B. 6 Hen. IV. 7-33; Y. B. 1 Hen. V. 11-21; Y. B. 36 Hen. VI. 9, 10-5; Y. B. 18 Ed. IV. 23-5; Y. B. 1 Ed. V. 2-2; Robsert v. Andrews, Cro. El. 82; Huntley v. Griffith, Gold. 159; Harrington v. Rotheram, Hob. 36, Brownl. 26 s. c.; Clark's Case, Godb. 210, pl. 299. See also Ames, *Cases on Trusts* (2d ed.), 1 n. 3, 4 n. 1.

<sup>3</sup> Y. B. 34 Ed. I. 239; Y. B. 12 & 13 Ed. III. 244; Y. B. 39 Ed. III. 17, A; Y. B. 3 Hen. VI. 43-20; Y. B. 9 Hen. VI. 38-13; Y. B. 9 Hen. VI. 60, A-8; Y. B. 18 Hen. VI. 9, A-7, and other authorities cited in Ames, *Cases on Trusts* (2d ed.), 52 n. 1.

constituted the *quid pro quo* for the seller's duty to suffer the buyer to take possession of the chattel sold. If the bargain was for the reciprocal exchange of chattels, the delivery of the chattel by the one party would be as effective a *quid pro quo* as payment of purchase-money to support an action of Detinue against the other party. It was hardly an extension of principle to treat the delivery of the buyer's sealed obligation for the amount of the purchase-money as equivalent to actual payment of money, or delivery of a chattel, and accordingly we find in Y. B. 21 Edward III. 12-2, the following statement by Thorpe (Chief Justice of the Common Bench in 30 Edward III.): "If I make you an obligation for £40 for certain merchandise bought of you, and you will not deliver the merchandise, I cannot justify the detainer of the money; but you shall recover by a writ of Debt against me, and I shall be put to my action against you for the thing bought by a writ of Detinue of chattels." But it was a radical departure from established traditions to permit a buyer to sue in Detinue when there was merely a parol bargain of sale without the delivery of a physical *res* of any sort to the seller. But this striking change had been accomplished by the time of Henry VI. The new doctrine may be even older, but there seems to be no earlier expression of it in the books than the following statement by Fortescue, C. J.: "If I buy a horse of you, the property is straightway in me, and for this you shall have a writ of Debt for the money, and I shall have Detinue for the horse on this bargain."<sup>1</sup> From the mutuality of the obligations growing out of the parol bargain without more, one might be tempted to believe that the English law had developed the consensual contract more than a century before the earliest reported case of Assumpsit upon mutual promises.<sup>2</sup> But this would be a misconception. The right of the buyer to maintain Detinue, and the corresponding right of the seller to sue in Debt were not conceived of by the medieval lawyers as arising from mutual promises, but as resulting from reciprocal grants, — each party's grant of a right forming the *quid pro quo* for the corresponding duty of the other.<sup>3</sup>

<sup>1</sup> Y. B. 20 Hen. VI. 35-4; Y. B. 21 Hen. VI. 55-12. See, to the same effect, Y. B. 37 Hen. VI. 8-18, per Prisot, C. J.; Y. B. 49 Hen. VI. 18-23, per Choke, J., and Brian; Y. B. 17 Ed. IV. 1-23. See also Blackburn, *Contract of Sale*, 190-196.

<sup>2</sup> *Peck v. Redman* (1555), Dy. 113, appears to be the earliest case of mutual promises.

<sup>3</sup> If the bargain was for the sale of land and there was no livery of seisin, the buyer had no common-law remedy for the recovery of the land, like that of Detinue for chattels. Equity, however, near the beginning of the sixteenth century, supplied the com-



It remains to consider the most prominent of all the English real contracts, the simple contract debt. The writ in Debt, like writs for the recovery of land, was a *praecipe quod reddat*. The judgment for the plaintiff is that he recover his debt. In other words, as in the case of real actions, the defendant was conceived of as having in his possession something belonging to the plaintiff which he might not rightfully keep, but ought to surrender. This doubtless explains why the duty of a debtor was always for the payment of a definite amount of money or a fixed quantity of chattels.<sup>1</sup> A promise to pay as much as certain goods or services were worth would never support a count in Debt.<sup>2</sup> In Y. B. 12 Edw. IV. 9-22, Brian, C. J., said: "If I bring cloth to a tailor to have a cloak made, if the price is not determined beforehand that I shall pay for the making, he shall not have an action of Debt against me."<sup>3</sup> For the same reason, the *quantum meruit* and *quantum valebant* counts seem never to have gained a footing among the common counts in Debt, and in Assumpsit the *quantum meruit* and *quantum valebant* counts were distinguished from the *indebitatus* counts. But principle afterwards yielded so far to convenience that it became the practice to declare in *Indebitatus Assumpsit* when no price had been fixed by the parties, the verdict

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mon-law defect by compelling the seller to hold the land to the use of the buyer, if the latter had either paid or agreed to pay the purchase-money. Br. A.D. Feoff. al Use, 54; Barker v. Keate, 1 Freem. 249, 2 Mod. 249 s. c.; Gilbert, Uses, 52; 2 Sand. Uses, 57. The consideration essential to give the buyer the use of land was, therefore, identical with the *quid pro quo* which enabled him to maintain Detinue for a chattel. Inasmuch as the consideration for parol uses was thus clearly borrowed from the common-law doctrine of *quid pro quo*, it seems in the highest degree improbable that the consideration for an *Assumpsit* was borrowed by the Common Law from Equity. 2 HARV. L. REV. 18, 19. But see Salmond, Essays in Jurisprudence, 213.

<sup>1</sup> A debtor might as easily owe chattels as money. A debt of chattels would arise from the same *quid pro quo* as a debt of money. A lessee might accordingly be charged in debt for chattels by the lessor. Y. B. 20 and 21 Ed. I. 139; Y. B. 50 Ed. III. 16-8. Y. B. 34 Hen. VI. 12-23; Anon. 3 Leon. 260; Denny v. Parnell, 1 Roll. Ab. 591, pl. 1. Or an employer by his employee. Y. B. 7 Ed. III. 12-2; Weaver v. Best, Winch. 75. Or a vendor by his vendee. Y. B. 34 Ed. I. 150; Y. B. 27 Hen. VII. 8-20. As *Indebitatus Assumpsit* would lie for a debt payable in money, it was also an appropriate remedy for a debt payable in chattels. Cock v. Vivyan, 2 Barnard, 293, 384; Falmouth v. Penrose, 6 B. & C. 385; Mayor v. Clerk, 4 B. & Al. 268. The judgment in Debt for Chattels was like that in Detinue that the plaintiff recover his chattels. The essential distinction between Detinue and Debt for chattels seems to be this, — Detinue was the proper remedy for the recovery of a specific chattel, Debt, on the other hand, for the recovery of a specific amount of unascertained chattels.

<sup>2</sup> Johnson v. Morgan, Cro. El. 758.

<sup>3</sup> See to the same effect Y. B. 3 Hen. VI. 36-33; Anon., 2 Show. 183; Young v. Ashburnham, 3 Leon. 161; Mason v. Welland, Skin. 238, 242.

of the jury being treated as equivalent to a determination of the parties at the time of bargain.

The ancient conception of a creditor's claim in Debt as analogous to a real right manifested itself in the rule that a plaintiff must prove at the trial the precise amount to be due which he demanded in his *præcipe quod reddat*. If he demanded a debt of £20 and proved a debt of £19, he failed as effectually as if he had declared in Detinue for the recovery of a horse and could prove only the detention of a cow.<sup>1</sup> For the same reasons Debt would not lie for money payable by instalments, until the time of payment of the last instalment had elapsed, the whole amount to be paid being regarded as an entire sum, or single thing.<sup>2</sup>

The *quid pro quo* which the debtor must receive to create his duty might consist of anything that the law could regard as a substantial benefit to him. Debts were usually founded upon a loan of money, a sale, a lease of property to the debtor, or upon work and labor performed for him. The *quid pro quo* in all these cases is obvious.<sup>3</sup> The execution of a release by an obligee to an obligor was also a sufficient *quid pro quo* to create a new debt between the same parties.<sup>4</sup> Forbearance to sue on a claim has been regarded in the same light: "for the forbearing of a suit is as beneficial in saving, as some other things would have been in gaining."<sup>5</sup>

But Debt will not lie upon mutual promises. In *Smith v. Airey*<sup>6</sup> Holt, C. J., said that "winning money at play did not raise a debt, nor was debt ever brought for money won at play, and an

<sup>1</sup> Y. B. 3 Hen. VI. 4-4; Y. B. 11 Hen. VI. 5-9; Y. B. 21 Ed. IV. 22-2; *Smith v. Vow*, Moore, 298; *Bagnall v. Sacheverell*, Cro. El. 292; *Bladwell v. Stiglin*, Dy. 219; *Baylis v. Hughes*, Cro. Car. 137; *Calthrop v. Allen*, Hetl. 119; *Ramsden's Case*, Clayt. 87; *Hooper v. Shepard*, 2 Stra. 1089; *Hulme v. Sanders*, 2 Lev. 4. In *Vaux v. Mainwaring*, Fort. 197, 1 Show. 215 s. c., the distinction was taken that in *Indebitatus Assumpsit* the plaintiff might recover the amount proved, but in Debt the amount stated in the writ or nothing. But afterwards the plaintiff was not held to a proof of the amount stated in the writ even in Debt. *Aylett v. Lowe*, 2 W. Bl. 1221; *Walker v. Witter*, Doug. 6; *M'Quillin v. Cox*, 1 H. Bl. 249; *Lord v. Houston*, 11 East, 62. See also *Parker v. Bristol Co.*, 6 Ex. 706, per Pollock, C. B., and 1 Chitty, P. (7th Ed.) 127-128.

<sup>2</sup> *Rudder v. Price*, 1 H. Bl. 547.

<sup>3</sup> If a bargain was for the sale of unascertained chattels, the transaction gave rise to mutual debts, the reciprocal grants of the right to a sum certain of money and a fixed amount of chattels forming the *quid pro quo* for the corresponding debts. Y. B. 21 Hen. VI. 55-12; *Anon.* Dy. 30, pl. 301; *Slade's Case*, 4 Rep. 94 b. See *supra*, p. 259.

<sup>4</sup> Y. B. 12 Hen. IV. 17-13.

<sup>5</sup> *Bidwell v. Catton*, Hob. 216.

<sup>6</sup> 2 Ld. Ray. 1034, 6 Mod. 128, Holt, 329 s. c.

*Indebitatus Assumpsit* would not lie for it; but the only ground of the action in such cases was the mutual promises. That though there were a promise, yet Debt would not lie upon that." According to another report of the same case Lord Holt said, "There is no way in the world to recover money won at play but by special Assumpsit."<sup>1</sup>

Originally there was no *quid pro quo* to create a debt against a defendant if the benefit was conferred upon a third person, although at the defendant's request. Y. B. 9 Henry V. 14-23 is a case in point. The plaintiff, having a claim for £10 against T, released the claim upon the defendant's promise to pay him the same amount. The plaintiff failed because the benefit of the release was received by T.<sup>2</sup> In Y. B. 27 Henry VIII. 23, upon similar facts, Fitz-James, C. J., thought the plaintiff should recover in an action on the case upon the promise, but not in Debt, "for there is no contract,<sup>3</sup> nor has the defendant *quid pro quo*. Post, J., and Spelman, J., on the other hand, thought there was a *quid pro quo*. It was also made a question, on the same ground, whether a defendant who promised money to the plaintiff if he would marry the defendant's daughter was liable in Debt to the plaintiff who married the daughter.<sup>4</sup> But here, too, the opinion finally prevailed that though the girl got the husband, her father did receive a substantial benefit.<sup>5</sup> In Y. B. 37 Henry VI. 9-18, Moyle, J., said: "If I say to a Surgeon that if he will go to one J who is ill, and give him medicine and make him safe and sound, he shall have 100 shillings, now if the Surgeon gives J the medicines and makes him safe and sound, he shall have a good action [Debt] against me for the 100 shillings, and still the thing is to another and not to the defendant himself, and so he has not *quid pro quo*, but

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<sup>1</sup> Walker v. Walker, Holt, 328, 5 Mod. 13, Comb. 303 s. c. Per Holt, C. J., "This is merely a wager and no *Indebitatus Assumpsit* lies for it; for to make that lie, there must be a work done, or some meritorious action for which Debt lieth." Hard's case, 1 Salk 23; Bovey v. Castleman, 1 Ld. Ray. 69. Per Curiam: "For mutual promises *Assumpsit* may lie, but not *Indebitatus Assumpsit*." These statements that Debt will not lie upon mutual promises bring out with great clearness the distinction already referred to between mutual promises and the mutual duties growing out of a parol bargain and sale. See Pollock, Contracts in Early English Law, 6 HARV. L. REV. 398, 399.

<sup>2</sup> The true ground of this decision seems sometimes to have been misunderstood. Holmes, Common Law, 267.

<sup>3</sup> After Assumpsit came in, it was many years before it was called a contract. That term was still confined to transactions resting upon a *quid pro quo*. See 2 HARV. L. REV. 15, and Jenks, Doctrine of Consideration, 134.

<sup>4</sup> Y. B. 37 Hen. VI. 8-18; Y. B. 15 Ed. IV. 32-14; Y. B. 20 Ed. IV. 3-17.

<sup>5</sup> Appleythwaite v. Northby, Cro. El. 29; Beresford v. Woodroff, 1 Rolle, R. 433.



the same in effect." This reasoning of Moyle, J., met with general favor, and it became a settled rule that whatever would constitute a *quid pro quo*, if rendered to the defendant himself, would be none the less a *quid pro quo*, though furnished to a third person, provided that it was furnished at the defendant's request, and that the third person incurred no liability therefor to the plaintiff. Accordingly, a father was liable for physic provided for his daughter;<sup>1</sup> a mother for board furnished to her son;<sup>2</sup> a woman was charged in Debt by a tailor for embroidering a gown for her daughter's maid;<sup>3</sup> a defendant was liable for instruction given at his request to the children of a stranger, or for marrying a poor virgin.<sup>4</sup> The common count for money paid by the plaintiff to another at the defendant's request is another familiar illustration of the rule.

But it is an indispensable condition of the defendant's liability in Debt in cases where another person received the actual benefit, that this other person should not himself be liable to the plaintiff for the benefit received. For in that event the third person would be the debtor, and one *quid pro quo* cannot give rise to two distinct debts.<sup>5</sup> Accordingly where the plaintiff declared in Debt against A for money *lent* to B at A's request, his declaration was adjudged bad; for a loan to B necessarily implied that B was the debtor. If B was, in truth, the debtor, the plaintiff should have declared in Special Assumpsit against A on the collateral promise. If B was not the debtor, the count against A should have been for money *paid* to B at A's request.<sup>6</sup> By the same reasoning it would be improper to count against A for goods *sold* to B at A's request. If B was really the buyer, A should charge him in debt, and A in Special Assumpsit on the collateral promise. If B was not the buyer, the count against A should be for goods *delivered* to B at A's request.<sup>7</sup> The same distinction holds good as to services ren-

<sup>1</sup> *Stonehouse v. Bodvil*, T. Ray. 67, 1 Keb. 439, s. c.

<sup>2</sup> *Bret v. J. S.*, Cro. El. 756.

<sup>3</sup> *Shandois v. Stinson*, Cro. El. 880.

<sup>4</sup> *Harris v. Finch*, Al. 6.

<sup>5</sup> "There cannot be a double debt upon a single loan." *Per Curiam*, in *Marriott v. Lister*, 2 Wils. 141, 142.

<sup>6</sup> "If it had been an *Indebitatus Assumpsit* for so much money paid by the plaintiff at the request of the defendant unto his son, it might have been good, for then it would be the father's debt and not his son's; but when the money is lent to the son, 't is his proper debt, and not the father's." *Per Holt, C. J.*, in *Butcher v. Andrews*, Carth. 446 (Salk. 23; Comb. 473, s. c.). See also *Marriott v. Lister*, 2 Wils. 141.

<sup>7</sup> *Y. B. 27 Hen. VIII.* 25-3, *per Fitz James, C. J.*; *Hinson v. Burridge*, Moore, 701; *Cogan v. Green*, 1 Roll. Ab. 594; *Anon.*, 1 Vent. 293; *Stonehouse v. Bodvil*, 1 Keb. 439;

dered to B at A's request. If B is a debtor A is not, but only collaterally liable in *Assumpsit*.<sup>1</sup>

The distinction between Debt and Special *Assumpsit*, as illustrated in the cases mentioned in the preceding paragraph, is of practical value in determining whether a promise is in certain cases within the Statute of Frauds relating to guaranties. If B gets the enjoyment of the benefit furnished by the plaintiff at A's request, but A is the only party liable to the plaintiff, A's promise is not within the statute. If, on the other hand, B is liable to the plaintiff for the benefit received, that is, is a debtor, A's promise is clearly a guaranty and within the statute.<sup>2</sup>

There were obviously many parol agreements that did not come within the scope of Debt, Detinue, or Account. This difficulty was at length met by the action of *Assumpsit*, which became, indeed, a remedy upon all parol agreements.<sup>3</sup> But the distinction between Debt and *Assumpsit* is fundamental. For, while *Assumpsit* might always be brought where Debt would lie upon a simple contract, the converse is not true. There were many cases where *Assumpsit* was the only remedy. *Assumpsit* would lie both where the plaintiff had incurred a detriment upon the faith of the defendant's promise, and where the defendant had received a benefit. Debt would lie only in the latter class of cases. In other words, Debt could be brought only upon a real contract, — *Assumpsit* upon any parol contract.

J. B. Ames.

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Hart v. Langfitt, 2 Ld. Ray. 841, 842, 7 Mod. 148 s. c.; Rozer v. Rozer, 2 Vent. 36, overruling Kent v. Derby, 1 Vent. 311, 3 Keb. 756, s. c.

<sup>1</sup> Alford v. Eglishfield, Dy. 230, pl. 56; Baxter v. Reed, Dy. 272 n. (32); Nelson's Case, Cro. El. 880 (cited); Trevilian v. Sands, Cro. Car. 107, 193, 1 Roll. Ab. 594, pl. 14. A was the debtor and B was not liable in Woodhouse v. Bradford, 2 Rolle R. 76, Cro. Jas. 520 s. c.; Hart v. Langfitt, 2 Ld. Ray. 841, 7 Mod. 145 s. c.; Jordan v. Tompkins, 2 Ld. Ray. 982, 6 Mod. 77 s. c.; Gordon v. Martin, Fitzg. 302; Ambrose v. Roe, Skin. 217, 2 Show. 42 s. c.

<sup>2</sup> Watkins v. Perkins, 1 Ld. Ray. 224; Buckmyr v. Darnell, 2 Ld. Ray. 1085, 3 Salk. 15 s. c.; Jones v. Cooper, Cowp. 227; Matson v. Wharam, 2 T. R. 80.

<sup>3</sup> For an account of the development of *Assumpsit* see 2 HARV. L. REV. 1-19, 53-69.

## VOLUNTARY ASSIGNMENTS AND INSOLVENCY IN MASSACHUSETTS.

WHILE the insolvent laws of Massachusetts have been much developed, and have occupied much of the field formerly covered by voluntary assignments for the benefit of creditors, many of the largest cases of adjustments between debtors and creditors are still settled outside of the courts. It has been often argued, but never, so far as the writer is aware, clearly decided, that a voluntary assignment can be upset in all cases by proceedings *in invitum* under the insolvent laws. If such is the fact, it must depend upon some provisions of those laws, and to determine the fact it becomes necessary to review the history of both systems of liquidation and of their relations to each other.

At common law one could transfer his property to whomsoever he pleased, provided he had not already passed the title to another; in other words, a conveyance could be set aside only by those having a prior title. This right was much abused, and led to the statutes of Elizabeth making conveyances void when they tended to delay, hinder, or defraud creditors,<sup>1</sup> or when thereby subsequent purchasers for value were deprived of their rights.<sup>2</sup>

There was, however, nothing in these statutes to prevent a man's paying his debts in whatever way he pleased, and to whichever creditors he chose, and therefore a direct preference to a creditor was perfectly valid;<sup>3</sup> but in Massachusetts the absence of full equity powers in the courts, and more especially the statutes establishing attachment on mesne process, led to the qualification that the creditor must assent to and accept the preference.<sup>4</sup> So

<sup>1</sup> 13 Eliz. ch. 5.

<sup>2</sup> 27 Eliz. ch. 4.

<sup>3</sup> Russell v. Woodward, 10 Pick. 408 (1830); Stevens v. Bell, 6 Mass. 339 (1810); Widgery v. Haskell, 5 Mass. 144, 153 (1809); First National Bank of Easton v. Smith, 133 Mass. 26, 31 (1882); Green v. Tanner, 8 Met. 411, 421 (1844); Bernard v. Barney Myroleum Co., 147 Mass. 356 (1888); Giddings v. Sears, 115 Mass. 505 (1874); Frank v. Bobbitt, 155 Mass. 112 (1890); Train v. Kendall, 137 Mass. 366 (1884); May v. Wannemacher, 111 Mass. 202 (1872); Adams v. Blodgett, 2 W. & M. 233 (1846).

<sup>4</sup> Stevens v. Bell, 6 Mass. 339, 342 (1810); Widgery v. Haskell, 5 Mass. 144, 153 (1809).



when sued the debtor might confess his debt, or be defaulted.<sup>1</sup> Even a conveyance fraudulent as to creditors was good against the grantor and his heirs.<sup>2</sup>

One of the first cases in which the preferring of creditors was done by a trust instead of by a direct conveyance or payment was *Widgery v. Haskell*.<sup>3</sup> The assignment in this case recited the desire of the assignors that all their property should be fairly distributed to their creditors, except that certain indorsers on bonds were to be first paid in full. The plaintiffs, who were assignees under the deed of trust, agreed to distribute the property assigned *pro rata* to all creditors who would release any suits pending, and release the assignors from all liability, and give notice within six months of their consent to the arrangement. The defendant was a sheriff holding under an attachment in the suit of a creditor who did not assent to the assignment, and it appeared that the property attached was not necessary to pay either the preferred creditors mentioned in the assignment or the assignees themselves. The assignees were the only unpreferred creditors who assented to the arrangement. The court held the assignees were not entitled to recover. The opinion is full of *dicta*, some of which were erroneous.<sup>4</sup>

The court said that creditors must assent to the preference or the payment as much where it was made indirectly as where it was made directly, and that such assent could not be presumed to exist.<sup>5</sup> The reason for requiring the assent of creditors was the same as in the case of a direct conveyance, and the absence of equity powers to control a trust in favor of creditors, not parties, seemed to be the chief difficulty the court felt in upholding the assignment. They say, however, "We would not be understood as giving an opinion that an insolvent debtor cannot convey an estate in trust to pay particular creditors who are assenting and parties to the

<sup>1</sup> *Eastman v. Eveleth*, 4 Met. 137, 149 (1842).

<sup>2</sup> *Drinkwater v. Drinkwater*, 4 Mass. 353, 357 (1808). And the same is true of a conveyance in fraud of the insolvent law. *Potter v. Belden*, 105 Mass. 11 (1870).

<sup>3</sup> 5 Mass. 144 (1809). Cf. *Hatch v. Smith*, 5 Mass. 42 (1809).

<sup>4</sup> It has been decided, for example, *contra* to the *dictum* of Parsons, C. J., that an assignment containing a provision for the release of claims by creditors is perfectly good. See *Borden v. Summer*, 4 Pick. 266; *Andrews v. Ludlow*, 5 Pick. 28; *Lupton v. Cutter*, 8 Pick. 298.

<sup>5</sup> Page 153. Followed in *Ward v. Lewis*, 4 Pick. 518; *New England Bank v. Lewis*, 8 Pick. 113; *Viall v. Bliss*, 9 Pick. 13; *Ward v. Lamson*, 6 Pick. 358; *Brewer v. Pitkin*, 11 Pick. 298; *Russell v. Woodward*, 10 Pick. 408.

conveyance; for we perceive no difference as to the effect on other creditors whether the estate be conveyed directly to the particular creditors, or with their assent to others in trust for them."<sup>1</sup>

The court, then, refused to uphold the assignment except as to such creditors as actually were assenting parties. The same principle applies where the assignee is not himself a creditor, and has in fact given no consideration for the conveyance to him, although a nominal consideration be expressed in the deed. Such a conveyance, though good between the parties, is not valid as against the creditors.<sup>2</sup> It is otherwise where the assignee is himself a creditor, for in that case he acts in two capacities, as creditor and as assignee: as assignee there is a consideration for the conveyance, because he has an interest; as creditor he can assent to the arrangement.<sup>3</sup> This is true, although he is the only creditor who assents; but the transfer must be not so much in excess of his claim as to furnish a presumption of fraud.<sup>4</sup>

The court will search for fraud in any such conveyance,<sup>5</sup> and will allow secret assignments with fraudulent intent to be proved by parol.<sup>6</sup> Of course the assignments must not only be pure from fraud, but they must be regular in form, and suitable to accomplish the purposes intended;<sup>7</sup> there must be proper covenants on the part of the assignee as to applying the property, and the assent of a creditor must appear to protect the assigned property from attachment.<sup>8</sup>

Now what could a creditor do who was not a party to the assignment? Where the assignment was invalid for any of the reasons

<sup>1</sup> Page 154.

<sup>2</sup> *Parker v. Kinsman*, 8 Mass. 486 (1812). See *Bradford v. Tappan*, 11 Pick. 76, 78 (1831).

<sup>3</sup> *Harris v. Sumner*, 2 Pick. 129 (1824).

<sup>4</sup> *Hastings v. Baldwin*, 17 Mass. 552 (1822).

<sup>5</sup> *Shaw, C. J.*, thus defines fraud: "But if under a pretence of a conveyance for the benefit of creditors the debtor transfers his property on any secret trust for himself, if it is attended with any of the known badges of fraud not satisfactorily explained or removed, the conveyance is void at law; . . . it must appear that the assignment was made upon a valuable and adequate consideration and in good faith to satisfy or secure real existing debts, or to indemnify against actual or subsisting liabilities." *Russell v. Woodward*, 10 Pick. 408, 412, 413 (1830).

<sup>6</sup> *Hills v. Eliot*, 12 Mass. 26 (1815).

<sup>7</sup> *Quincy v. Hall*, 1 Pick. 357 (1823); *Harris v. Sumner*, 2 Pick. 129 (1824).

<sup>8</sup> If the assignment requires it, the assent must be in writing. *Brewer v. Pitkin*, 11 Pick. 298 (1831); *Ward v. Lamson*, 6 Pick. 358 (1828). Assent may be shown by claiming the benefit of the assignment. *May v. Wannemacher*, 111 Mass. 202; *Pierce v. O'Brien*, 129 Mass. 314. It may be verbal. *Wiley v. Collins*, 11 Me. 193.

mentioned above, he could proceed as if it did not exist, and attach the property in the assignee's hands by trustee process. Even a debt due to the assignee was not exempted.<sup>1</sup> If the conveyance was valid, he might attach by trustee process the balance of property in the assignee's hands not needed to satisfy the claims of those creditors who had assented to the assignment;<sup>2</sup> and such attachment will hold the surplus as against subsequent assenting creditors.<sup>3</sup> It makes no difference in the creditor's right of attachment whether the assignment provides in terms for the payment of certain creditors only, or for the payment of all creditors; in either case the property is protected only to the extent of the assenting creditors' claims. The character of the property, whether real, personal, or *choses in action*, is immaterial, as is also the fact of the assignee's having converted it into money, if such should chance to be the case.<sup>4</sup>

Such in brief were the principal points decided up to the passage of the Act of 1836 regulating assignments. It is to be noted, in view of later decisions, that there are three possible meanings of the word "preference," and that a conveyance constituting a "preference" in either sense was perfectly good up to this time. The conveyance might be to one or more creditors to the exclusion of the others,—a simple preference; or in trust to pay certain creditors first, and the rest afterwards,—an assignment with preferences; lastly, an assignment without preferences for the benefit of all creditors who assent within a reasonable time might be considered by some a species of preference.

The Act of 1836 altered this state of things in two particulars: it provided, first, that all assignments must be free from preferences; and, second, that when made in accordance with the terms of the Act, they should be valid against attaching creditors.<sup>5</sup> The preferences forbidden by the Act were of the second kind mentioned above; that is to say, the Act did not impair the right to give a preference, except when the preference was contained in an assignment.<sup>6</sup> All creditors were allowed to become parties at any

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<sup>1</sup> Harris v. Sumner, 2 Pick. 129 (1824).

<sup>2</sup> Borden v. Sumner, 4 Pick. 265 (1826); Bradford v. Tappan, 11 Pick. 78 (1831); Fall River Iron Works v. Croade, 15 Pick. 11, 16 (1833), and cases cited.

<sup>3</sup> Bradford v. Tappan, 11 Pick. 78 (1831).

<sup>4</sup> Fall River Iron Works v. Croade, 15 Pick. 11, 16 (1833).

<sup>5</sup> St. 1836, ch. 238, §§ 1, 3.

<sup>6</sup> Henshaw v. Sumner, 23 Pick. 446 (1839); Brown v. Forster, 2 Met. 152, 154 (1840); Macomber v. Weeks, 3 Met. 512, 514 (1842); Burt v. Perkins, 9 Gray, 317 (1857).



time before the final dividend,<sup>1</sup> and only such debts were to be preferred as by the laws of the United States or of the Commonwealth were entitled to preference.<sup>2</sup> Any assignor complying with the provisions of the Act was to be discharged from his debts unless it appeared (1) that he had fraudulently concealed, reserved, or disposed of any property; (2) that he had made false statements concerning the disposition of his property; (3) that he had made any conveyance with a view to give a preference when in contemplation of insolvency; or (4) that he had given notice of his insolvency to any creditor with a view that he should obtain a preference.<sup>3</sup> To make the Act still stronger, it was provided further that "No assignment or conveyance made by any insolvent debtor to assignees or trustees for the use of any of his creditors shall be valid or effectual against an attachment or execution in behalf of any creditor who is not a party to it, unless it is so made as to allow all the creditors of the debtor to become parties to it, if they see fit; and unless also it is so made as to give to each of the creditors who shall become parties to it an equal share of the property in proportion to their respective debts, excepting only such creditors as may by the laws of the United States or of this Commonwealth be entitled in such case to a preference."<sup>4</sup>

Such were the provisions of the Act relevant to our inquiry. There were, besides, many provisions to secure its fair working and proper application, giving rise to many decisions with which we need not concern ourselves. Leaving now for the moment the subject of voluntary assignments, let us trace the development of the insolvent law.

The first Act regulating proceedings *in invitum* was passed in 1838,<sup>5</sup> and specified as the grounds upon which its aid could be invoked, the following:—

(1) If any person arrested on mesne process in an action for \$100 or upwards should fail to give bail before the return day of process. (2) If any person should be imprisoned more than thirty days upon mesne process or execution in an action for \$100 or upwards. (3) If any person whose goods or estate were attached in an action for \$100 or upwards should not dissolve the attachment before the last day of the return term.<sup>6</sup>

It was provided that, in these cases, any creditor might apply, by

<sup>1</sup> § 4.

<sup>2</sup> § 3.

<sup>3</sup> § 9.

<sup>4</sup> § 11.

<sup>5</sup> St. 1838, ch. 163, § 19.

<sup>6</sup> Within seven days from the return day of the writ. Stat. 1851, ch. 189.

petition, within ninety days after the act alleged in the petition as the ground of proceedings, and not afterwards.

The Act of 1844<sup>1</sup> added four other grounds for proceedings against a debtor:—

(4) Removing himself or any part of his property from the State with intent to defraud creditors; (5) concealing himself to avoid arrest, or concealing any part of his property to avoid attachment; (6) procuring himself to be arrested or his property to be attached; (7) making any fraudulent conveyance or transfer of his property.<sup>2</sup>

The above provisions are substantially unchanged at the present day; another ground only having been added, (8) in a provision as to fraudulent stopping payment of commercial paper by certain classes of persons.<sup>3</sup> The ordinary provisions making fraudulent payments, transfers, and conveyances within six months of the filing of a petition against a debtor void under certain circumstances,<sup>4</sup> give a remedy to the assignee merely, and are not expressly made grounds for proceedings by a creditor.

Let us now return to voluntary assignments and consider what effect the insolvent laws have had upon them, either through their express provisions, above cited, or their mere existence.

In *Carter v. Sibley*,<sup>5</sup> there was an assignment under the Act of 1836, which would not have been good at common law, and the question therefore was whether the Act of 1836 was still in force. It was held that, as far as the statutes of 1838 and 1836 affected the same classes of persons, viz., those whose debts in the aggregate amounted to \$500 or over,<sup>6</sup> the Act of 1838 repealed the assignment law.<sup>7</sup> It was afterwards decided that the eleventh section of the Act of 1836 was not repealed by the Act of 1838, so that creditors had the double protection of both Acts.<sup>8</sup> The assignment Act was expressly and entirely repealed in 1856.<sup>9</sup>

<sup>1</sup> St. 1844, ch. 178, § 9.

<sup>2</sup> The person receiving such payment, transfer, or conveyance need not have reasonable cause to believe the debtor insolvent to make the transfer bad. St. 1856, ch. 284, § 29.

<sup>3</sup> St. 1879, ch. 245, § 7. See St. 1894, ch. 261.

<sup>4</sup> St. 1856, ch. 284, §§ 25-29; now P. S. ch. 157, §§ 96, 98.

<sup>5</sup> 4 Met. 298 (1842).

<sup>6</sup> The law of 1838 operated only where the debts amounted to \$500 or over. This was reduced by St. 1841, ch. 124, § 1, to \$200.

<sup>7</sup> See also *Wyles v. Beals*, 1 Gray, 233 (1854), where, however, this point was not necessary to the decision; *Edwards v. Mitchell*, 1 Gray, 239 (1854).

<sup>8</sup> *Zipcey v. Thompson*, 1 Gray, 243 (1854).

<sup>9</sup> Stat. 1856, ch. 163; but see 109 Mass. 38, 39.

If we now consider the cases arising under the Act of 1838 we shall find several *dicta* as to the effect of the insolvent law on voluntary assignments. In *Wyles v. Beals*,<sup>1</sup> a case of *scire facias* against a voluntary assignee, the assignment provided for the distribution of the property in precisely the same manner as it would have been distributed under the insolvent law. Shaw, C. J., mentioned several reasons why the assignment was invalid as against attaching creditors. The fifth reason was because it defeated the rights of creditors to proceed *in invitum* under the Act of 1838. Counsel for the defendant had argued that an assignment valid at common law was not void under the statute of 1838, unless the remedy provided by that law was invoked to set it aside; but the court said that, even if the property could be distributed precisely as it would have been under the insolvent law, yet the assignment was opposed to the whole spirit of the law. If it was proposed to pay a dividend to creditors not parties to the assignment, it was (as we have seen) bad at common law; if it did not pay everybody there was no equal distribution. It is to be noticed in the case that the assignment did not transfer all the property, and so was bad in any case, and the assignment did not follow closely in any respect the provisions of the insolvent law.

*Edwards v. Mitchell*<sup>2</sup> was to the same effect, though as Wells, J., says, in a later case,<sup>3</sup> the decision was "pointedly put on the statute of 1836." Neither in these cases, however, nor in the cases following them, is there any intimation that the assignment could be attacked by proceedings under the statute of 1838. They were all cases of trustee process by non-assenting creditors, and go no further than holding the assignments in question invalid as against attachment. Even then, if the assignee has distributed the property, there is no remedy,<sup>4</sup> and where the whole has not been distributed the assignee has a private set-off against a creditor, though not against the assignee in insolvency.<sup>5</sup>

The only case in which an assignment was avoided by a petition in insolvency was *Bartlett v. Bramhall*,<sup>6</sup> and there the petition was a voluntary petition by the debtor.

<sup>1</sup> 1 Gray, 233 (1854).

<sup>2</sup> 1 Gray, 239 (1854). See also *Zipcey v. Thompson*, 1 Gray, 243 (1854), where, however, the assignment was bad under St. 1836, as containing preferences. *Grocers' Bank v. Simmons*, 12 Gray, 440 (1859); *Stanfield v. Simmons*, 12 Gray, 442 (1859).

<sup>3</sup> *National Mechanics', etc. Bank v. Eagle Sugar Refinery*, 109 Mass. 38 (1871).

<sup>4</sup> *Leland v. Drown*, 12 Gray, 437 (1859); *Bowles v. Graves*, 4 Gray, 117 (1855).

<sup>5</sup> *Banfield v. Whipple*, 14 Allen, 13 (1867).

<sup>6</sup> 3 Gray, 257 (1855).



Then came the important case of *National Mechanics' and Traders' Bank v. Eagle Sugar Refinery*.<sup>1</sup> This also was a trustee process against voluntary assignees, and, as before, the trust provided for a *pro rata* devision among all creditors who should come into it. It was held an attaching creditor could *not* upset the assignment. Wells, J., says: "It is to be observed that, under 1836, ch. 238, § 11, an assignment contrary to its provisions is declared to be invalid and ineffectual as against an attachment or execution in behalf of any creditor not a party to it, while under 1838, ch. 163, § 10, the invalidity could be availed of only by the assignee constituted by the proceedings in insolvency;" and later, "We are unable to see in what respect a conveyance to trustees, like the present, stands in any different relation to the general insolvent laws of Massachusetts, or the bankruptcy laws of the United States, from that of a simple conveyance to a creditor by way of preference. We are inclined, therefore, to ascribe to statute 1836, ch. 238, the whole legal effect of the decisions first referred to [*Wyles v. Beals* and cases following it]. That statute having been repealed, the assignment in question, even if voidable by an assignee in bankruptcy or insolvency, cannot be avoided by a creditor for his individual benefit without proof of that which would constitute fraud at common law."

To the same effect are the remarks of Woodbury, J., in *Adams v. Blodgett*.<sup>2</sup> That was an action of assumpsit by a creditor against the voluntary assignee. After noting that the assignment contained no preferences, and therefore was not *contra* to the Act of 1836, and that in any case that Act had been repealed by the Act of 1838, he says:—

"Nor does the Insolvent Act in terms prohibit any such conveyance as this, nor can it be implied from the fact that the two courses are exactly the same. They differ materially and unfavorably to the debtor. This trust dispenses with several forms and considerable expense, and holds the debtor still liable for the balance, whereas that course releases the debtor from liability for the balance, and subjects him to go through the statutory course in order to entitle himself to be released. . . . The insolvent statute of 1838 was held to repeal the assignment statute of 1836 because it substituted one statute system for another alike in substance, but differing in form. But here the Act of 1838 does not repeal the

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<sup>1</sup> 109 Mass. 38 (1871).

<sup>2</sup> 2 Woodbury & Minot, 233 (1846), U. S. Cir. Ct., 1st Circuit.

present trust by an implication of this kind, because it is not a trust made under 1836, and differs in some particulars from both statutes."

So in *Fairbanks v. Belknap*,<sup>1</sup> where an arrangement had been made to have assignees *in pais* continue the business for the benefit of creditors, Devens, J., said: "There could be no fraudulent preference intended where the same security was offered to all, and where the plan was to be accepted by all or to be inoperative." These last three cases, and particularly the *Eagle Sugar Refinery Case*, cannot be reconciled with the earlier series beginning with *Wyles v. Beals*, and ending with *Grocers' Bank v. Simmons* and *Stanfield v. Simmons*,—the last two of the series having been decided subsequently to the repeal, in 1856, of the law of 1836.

To sum up, then, the results thus far reached: since the repeal of the assignment law of 1836, voluntary assignments stand as at common law, except so far as affected by the insolvent laws; and it has been strongly intimated that assignments in which all the creditors can come in on equal terms are not obnoxious to the spirit of those laws. It has been held that they cannot be attacked by attachment. The law also remains as before, that a preference, or an assignment containing preferences, cannot be avoided by a creditor by attachment or trustee process.

The question whether any preferences could be grounds for an involuntary petition, besides those fraudulent at common law, had been answered affirmatively in *Ex parte Jordan*,<sup>2</sup> which decided that any conveyance made with intent to give a creditor a preference was a ground for a petition. The same point was decided in *Lothrop v. Highland Foundry Co.*<sup>3</sup> This was a bill in equity to restrain a petition by a creditor alleging that the debtor had made two mortgages to secure the payment of pre-existing debts to the mortgagees, with intent to secure to them a preference, and to defraud his creditors. The principal point decided was that proceedings *in invitum* could be instituted after the repeal of the national Bankrupt Act for a cause occurring while the Act was in force, and incidentally that the conveyance in question was a ground of insolvency. It was also decided, *contra* to some *dicta* in *Ex parte Jordan*, that in proceedings *in invitum* the knowledge or intent of the person receiving the payment, transfer, or conveyance is immaterial, though it would be material in a proceeding by

<sup>1</sup> 135 Mass. 179 (1883).

<sup>3</sup> 128 Mass. 120 (1880).

<sup>2</sup> 9 Met. 292 (1845).

the assignee in insolvency to recover back the property. There is, however, in these cases no intimation that an assignment under which all the creditors have equal rights is a preference, or is a fraudulent conveyance which can be the ground of involuntary proceedings.<sup>1</sup>

Remembering then that a preference is a "fraudulent conveyance," within section 112 of the present insolvent law, we have now to consider the argument that this expression, "fraudulent conveyance," includes any conveyance which is in any way a fraud upon the law under any other section. It may be said that it is absurd to provide that assignees when appointed can avoid a certain conveyance, and yet to say that such a conveyance shall not be a ground on which to apply for an assignee. Conveyances which are frauds upon the law must be either (1) such as would avoid a discharge under section 93, or (2) preferences under section 96, or (3) to prevent the property being distributed under the insolvent laws, or to defeat the objects of its provisions under section 98, or, as it is elsewhere expressed, "conveyances in derogation of the jurisdiction."<sup>2</sup>

(1) But it has been held that an assignment without preferences will not avoid a discharge.<sup>3</sup>

(2) The language of section 93 is very similar to that of sections 96 and 98, and we have the direct authority of *Fairbanks v. Belknap* that it is not a preference.

(3) We have already considered some Massachusetts cases which say that an assignment whose provisions closely resemble those of the insolvent law, and which give creditors equal rights, cannot be opposed to the spirit of the law, for they accomplish precisely what the law itself does. Against these must be put the almost uniform interpretation of the bankruptcy Acts both in this country and in England. The limits of this article will not permit a detailed examination of these statutes and decisions; but this is unnecessary, because the decisions do not turn on any peculiar wording of the statutes, but proceed upon the general principle that a

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<sup>1</sup> It is curious that the Highland Foundry Case does not mention a provision of the Act of 1856 to the express effect that a preference should be a ground of proceedings *in invitum* (St. 1856, ch. 284, § 25). The Commissioners on the General Statutes give no reason for omitting this provision in their report, and the inference is therefore that they supposed it was covered by other clauses. This Act, in common with the others, makes no mention of general assignments for the benefit of creditors.

<sup>2</sup> Cadwalader, J., in *Barnes v. Rettew*, 8 Phila. 133, 136.

<sup>3</sup> *Atkins v. Spear*, 8 Met. 490, 496 (1844).



*bona fide* assignment without preferences is of itself an act of bankruptcy.<sup>1</sup>

The early cases *contra* to this view seem to have been based largely on the opinion of Swayne, J., in *Langley v. Perry*,<sup>2</sup> and can no longer be considered law. On the other hand, the question has never been squarely decided by the Supreme Court of the United States, and in *Mayer v. Hellman*,<sup>3</sup> Field, J., remarked *obiter* that the position of counsel had much to commend it, viz., that such an assignment was only a voluntary execution of what the bankruptcy court can compel, and that, as it was not a proceeding in itself fraudulent as to creditors, and gave no preferences, it conflicted with no positive inhibition of the statute, citing the favorable opinion of Nelson, J., in *Sedgwick v. Place*<sup>4</sup> and of Swayne, J., in *Langley v. Perry*. In several cases assignments under State statutes regulating assignments have been held bad, because the State statutes were inconsistent with the bankrupt Acts,<sup>5</sup> and *contra* to the view sometimes expressed, that the assignments were held void because of what the statutes authorized, and not because the States attempted to regulate what Congress had said the general government alone should regulate;<sup>6</sup> these cases should be regarded as ambiguous on this point.<sup>7</sup>

<sup>1</sup> For a case in the District of Massachusetts, see *Re Union Pacific R. R. Co.*, 10 N. B. R. 178, Lowell, J. For the best general discussion of cases, see *Globe Ins. Co. v. Cleveland Ins. Co.*, 14 N. B. R. 311, 315 (Cir. Ct., N. Dist. Ohio); *Barnes v. Rettew*, 8 Phila. 133 (1871, Cir. Ct., E. Dist. Pa.).

See also, to the same effect, Burrill on Assignments, 6th ed., §§ 29 ff. (1893); Bump on Bankruptcy, 10th ed., 421 (1877); Blumenstiel on Bankruptcy, 96 (1878); 1 Deacon on Bankruptcy, 3d ed., 68; 1 Christian on Bankruptcy, 2d ed., 135. There were no decisions on this point under the first bankruptcy Act of 1800. Under the second Act of 1841, see *McLean v. Johnson*, 3 McLean, 202; *McLean v. Meline*, 3 id. 199.

The following are some of the earlier cases and *dicta contra* to the above. *Langley v. Perry*, 2 N. B. R. 596 (Cir. Ct. Ohio); *Farrin v. Crawford*, 2 N. B. R. 602 (Cir. Ct. Ohio); *Sedgwick v. Place*, 1 N. B. R. 673 (S. Dist. N. Y.); *Re Kintzing*, 3 N. B. R. 217 (E. Dist. Mo.); *Re Marter*, 12 N. B. R. 185, 187 (E. Dist. Mich.); *Smith v. Teutonia Ins. Co.*, 4 C. L. N. 130. See also *Re Arledge*, 1 N. B. R. 644 (S. Dist. Ga.); *Re Hawkins*, 2 N. B. R. 378 (Sup. Ct. Conn.); *Re Wells*, 1 N. B. R. 171 (N. Dist. N. Y.); *Mayer v. Hellman*, 91 U. S. 496, 500; *Brown v. Minturn*, 2 Gall. 557, 559; *Reed v. McIntyre*, 98 U. S. 507; *Bishop on Insolvent Debtors*, 2d ed., § 107.

For a detailed criticism of these cases, see *Globe Ins. Co. v. Cleveland Ins. Co.*, 14 N. B. R. 311.

<sup>2</sup> 2 N. B. R. 576 (C. Ct. Ohio).

<sup>3</sup> 91 U. S. 496; s. c. 13 N. B. R. 440.

<sup>4</sup> 1 N. B. R. 673.

<sup>5</sup> See *Boese v. King*, 108 U. S. 379, 385 (1882); *Reed v. McIntyre*, 98 U. S. 509-513.

<sup>6</sup> *Globe Ins. Co. v. Cleveland Ins. Co.*, *supra*.

<sup>7</sup> See *Griswold v. Pratt*, 9 Met. 16 (1845); *Day v. Bardwell*, 97 Mass. 246, 250 (1867); *Lothrop v. Highland Foundry Co.*, 128 Mass. 122 (1880).

In spite of the *dictum* of Field, J., in *Mayer v. Hellman*, the great preponderance of authority in the Circuit and District Courts of the United States, and the uniform rule in England<sup>1</sup> is to regard voluntary assignments as acts of bankruptcy. As a matter of principle, it is not clear that a voluntary assignment *is* in fraud of the jurisdiction. How can the same act supply the jurisdiction and be a fraud upon it? The act of assignment must be on this theory an act in fraud of a right not yet acquired. And if the jurisdiction be not already there, why should making an assignment be singled out as the deadly sin? Why not every other act done by an insolvent person, or why not make insolvency itself a ground of proceedings *in invitum*?<sup>2</sup>

The State courts do not always take the same view as the Federal courts on this point. It is held in New York, for example, that the intent of the bankrupt in making the assignment is a question of fact, and that in order to institute proceedings on account of it, it must be shown that he had an intent to contravene some provisions of the bankrupt law, and that the assignee knew of that intent.<sup>3</sup>

Similarly in Maryland, under a statute providing that any conveyance by an insolvent shall be *prima facie* intended to delay creditors, an assignment without preferences is held not *prima facie* fraudulent.<sup>4</sup>

The second Act in Massachusetts, dealing specifically with assignments, was passed in 1887.<sup>5</sup> It provides that all acts of trustees under assignments, whose provisions are in substantial conformity with the provisions of the insolvent law, done in caring for the property and converting it into money, shall be valid if the assignments have been assented to in writing by a majority in number and value of the unsecured creditors, even though subsequent proceedings in insolvency are instituted by or against the

<sup>1</sup> They are now regulated by Act, 1883, 46 & 47 Vict. ch. 52, § 4; cf. 1 Jac. I. ch. 15; 6 Geo. IV. ch. 16; *Worseley v. De Mattos*, 1 Burr. 827.

<sup>2</sup> For a further presentation of this view, see Burrill on Assignments, 6th ed. § 32. He also points out that none of the debates in Congress on the Act of 1867 showed any intention to adopt the English construction of the language from which our Acts were taken. It had long been a matter of common knowledge, and it would have been a natural thing to embody such a decision in the new Act.

<sup>3</sup> *Haas v. O'Brien*, 16 N. B. R. 508 (1876, Ct. of Appeals, N. Y.); *Von Hein v. Elkus*, 15 N. B. R. 194 (Sup. Ct. N. Y.).

<sup>4</sup> *Pfaff v. Perry*, 29 Atl. Rep. 824 (Ct. of Appeal, Md. 1894).

<sup>5</sup> St. 1887, ch. 340.



debtor. It also provides that the assignees in insolvency, "if the assignment shall be voidable by them," shall be entitled to recover the net proceeds in money of any sales of property by the voluntary assignee. This statute does not help us much on the question we have been considering. On the one hand, it does not distinctly recognize assignments as valid, but only protects the acts of trustees to a certain extent, and in certain cases; and, on the other hand, it protects them even where proceedings are instituted against the debtor upon some ground of section 112, other than a fraudulent conveyance. At first sight, the expression, "if the assignment shall be voidable," would seem to imply that some assignments are not voidable; the force of this inference is weakened, however, by its ambiguity. An assignment might be valid under this section either because it was not in itself a fraudulent conveyance or because the action to avoid it was not brought in due season. The Act is, therefore, too ambiguous to allow of strong inferences for or against the validity of voluntary assignments in general. Of considerable weight, however, is the fact that the Legislature, dealing with the general subject in this Act, with a knowledge that assignments were being made every day of the session, did not condemn them plainly or directly make them acts of insolvency.

We arrive, then, at this result. The question is still open in Massachusetts. The strongest considerations of convenience require that the system of voluntary assignments shall be upheld. By that method the business affairs of a debtor can often be settled in three months,—frequently the arrangements are substantially completed in a few weeks, or even days,—while at least six to twelve months are required under the insolvent law. In practice, although the assignee is usually chosen by the debtor, yet care is taken to choose a man who has the confidence of the creditors, in order to induce them to come into the arrangement. The fear of delay by insolvency proceedings, and of frightening away the creditors, will in general be sufficient to induce the debtor to have the assignment drawn in a fair and equitable form. Any assignment with unjust or fraudulent provisions, may be a ground of proceedings *in invitum* at once. The expense is also much less under a voluntary assignment, and the simplicity and speediness of the method may often make possible great economy in the business adjustments of the debtor.

It cannot be denied that there is some force in the arguments



against assignments based on the penal provisions of the insolvent Acts,<sup>1</sup> the power there given to examine the debtor under oath, and the machinery to set aside conveyances in fraud of equitable distribution. At the same time, the number of cases in which these provisions are needed is not large. In such cases a resort to proceedings under the insolvent law, in the first instance, would be much more likely to happen than not, and a debtor of that kind would be apt to give his creditors plenty of chances to invoke its help.

Our court, then, would have good reason, on Massachusetts authorities, in upholding voluntary assignments. Yet it is more than likely that they will follow the analogy of the bankruptcy Acts if the question ever comes before them.<sup>2</sup> The best course would be not to overthrow a system as old as the Commonwealth by a single decision, — for no one would dare to assign if a single churlish creditor could upset the assignment, — but, if further protection is needed for creditors, to let the Legislature give it in a way to protect assignments already in progress, and at the same time to simplify and expedite the course of the insolvent law.

*Prescott F. Hall.*

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<sup>1</sup> P. S. ch. 157, § 119. See Emmons, J., in *Globe Ins. Co. v. Cleveland Ins. Co.* 14 N. B. R., 311 at 325.

<sup>2</sup> Since this article was written, some of the questions herein discussed have come before the court in the case of *Steel Edge Stamping and Retinning Co. v. Manchester Savings Bank*. The validity of a voluntary assignment was raised by a bill in equity to stay insolvency proceedings. The writer was unaware of the case until after this article was finished. The case was argued Dec. 5 and 6, 1894, but the decision has not yet been handed down.

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AN AMERICAN REPRINT.—Sir Frederick Pollock desires the REVIEW to state that a new and *fourth* edition of his book on Torts is now in press, and that the American reprint called Webb's Pollock on Torts (noticed in the November number of the REVIEW, p. 186), which is taken from the *third* English edition, has been issued without any kind of authority or consent either from the English publishers or from himself.

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COMPARATIVE NEGLIGENCE.—On the question of contributory negligence, there has always been considerable dissension. Besides the orthodox common-law principle, prevailing in England and most of the States, and the rough and ready rule of the admiralty courts, there were several local idiosyncrasies, the most important of which was the doctrine of comparative negligence. This anomalous theory, first laid down by Breese, J., in *Galena, &c. R. R. Co. v. Jacobs*, 20 Ill. 478, 496, although founded on a misunderstanding of the law (Thompson on Negligence, 1169, note), was reiterated in so many cases that it became regarded as the settled law of Illinois (Beach on Contributory Negligence, second edition, 107), and though severely criticised and in some degree explained away (Cooley on Torts, second edition, 815), gained a foothold in Georgia, Kansas, Tennessee, and possibly elsewhere. (Beach, 103.)

This doctrine is now, however, on the wane, and, like other attitudes inconsistent with the progress of the common law toward assimilation, is being repudiated in the very jurisdiction in which it first took rise. Such, at least, would appear to be the significance of the statement by Bailey, J., in *North Chicago St. R. Co. v. Eldridge*, 38 N. E. R. 246, at 247, 150 Ill. St. In that case, one of contributory negligence, an instruction was asked for, to the effect that if the jury believed from the evidence in the case that the negligence of the plaintiff and defendant was equal or nearly so, then, in such case, their verdict should be for the defendant.

This instruction was rejected by the lower court, and on exceptions to this ruling, the upper court said: "The proposition embodied in this instruction doubtless finds support in some of the earlier decisions of this court, involving what was known as the doctrine of comparative negligence; but by more recent decisions that doctrine has been greatly modified, if not wholly repudiated."

This statement is unfortunately weakened, since the court rests its decision on another ground,—that the instruction asked for was quite unnecessary, as the law had already been laid down with sufficient accuracy and fulness. It is, therefore, somewhat hard to decide the exact weight of the case, or to conjecture what results will flow from it. At all events, it shows a tendency in the right direction.

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CONVERSION BY BAILEE.—*Doolittle v. Shaw*, 60 N. W. R. 621 (Iowa), was one of the familiar cases of violation of a bailment for hire by driving the horse hired beyond the place designated. The distinction taken by the court was that, as the injury to the horse was occasioned by no gross negligence or wilful abuse, no conversion took place, and that such had been the doctrine of *all* the cases.

It is submitted that this rests upon a misapprehension of the action of conversion, the gist of which lies in the interference with the plaintiff's possession or right to it, amounting to a complete denial for an appreciable time. The court is right in saying that not every intermeddling is a conversion, nor indeed every intermeddling contrary to the terms of the bailment. There must be some act which can be interpreted as a total deprivation of the plaintiff's possession or right to it, not consented to by him. In a bailment for a specific purpose the bailor consents to lose possession of the chattel under the conditions of the contract; but the general right to its possession subject to that exception clearly remains unimpaired, and any act interrupting wholly the right to possession except within those limits is as much a conversion as if there had been no bailment at all. Doubtless this application of conversion usually comes up when there has been some abuse of the chattel, as it is not ordinarily injured without that; but the conversion rests on grounds quite other than that of negligence or abuse. *Wentworth v. McDuffie*, 48 N. H. 402. It is altogether too strong, then, to say that this Iowa case follows the doctrine of "all the cases." But the action for conversion, being as it is a means of forcing title upon the converter against his will, it is most desirable that some way of limiting it should be worked out for use in cases where in justice the plaintiff is not entitled to elect title into the defendant. Such a case as this is a step away from a technical rule which enables a bailor to throw the peril of accident upon his bailee, and as such, a step in the right direction.

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DEVELOPMENT OF THE LAW OF PRIVACY.—One or two bits of news in the law of privacy may be given. The well-known English case of *Prince Albert v. Strange* has been followed in *W. S. Gilbert v. The Star Newspaper*, 11 *The Times Law Reports*, 4, where Mr. Gilbert got an injunction against the disclosure of the "gags" and the plot of "His Excellency" before the public performance of that comedy. An article, "The Right to Privacy," by Mr. Herbert Spencer Hadley, appeared in the October number



of the Northwestern Law Review (vol. iii. p. 1). Mr. Hadley is not inclined to admit the existence of a right to privacy. "When an individual walks along the streets in the sight of all," according to Mr. Hadley, "he has waived his right to the privacy of his personality;" and if a newspaper reporter sketches him and publishes the sketch accompanied by a "description of the peculiarities of his appearance, walk, habits, and manners,"—why, Mr. Hadley is sorry for the individual if it is distasteful. Mr. Hadley also makes the point that the right to privacy stretches equity jurisdiction beyond its proper limits. But it is not clearly set forth how it does so to a greater degree than any case of first impression does. And, finally, *Monson v. Tussaud* (10 *The Times Law Reports*, 199, 227, noticed 7 HARVARD LAW REVIEW, 492), the most important recent English case on the subject, is not mentioned, though decided and commented upon more than six months before the publication of this article.

*Corliss v. Walker*, 57 Fed. Rep. 434, came up a second time on Nov. 19, 1894, on a motion to dissolve the injunction restraining the use by the defendants of a picture of the late Mr. Corliss. Colt, J., decided that the injunction must be dissolved, Mr. Corliss being a public character, and his personal appearance therefore in a sense public property. On the rights of a private person the language is explicit. Colt, J., says that, "Independently of the question of contract, I believe the law to be that a private individual has a right to be protected in the representation of his portrait in any form, that this is a property as well as a personal right, and that it belongs to the same class of rights which forbids the reproduction of a private manuscript or painting, or the publication of private letters, or oral lectures delivered by a teacher to his class, or the revelation of the contents of a merchant's books by a clerk."

The other branch of the case still stands for the proposition that one may write and publish about either public or private persons; but, Mr. Corliss being held to be a public man, the remarks about private persons may be fairly said to be *obiter*, and the point open for the consideration which some gross case of invasion of privacy may soon require for it.

Mr. Hadley's article is well worth reading as the first attempt to make a careful presentation of the reasons against the right to privacy. And the new cases are interesting as showing that the law on the subject is in no danger of becoming obsolete, but rather serves a real and useful purpose to an increasing number of complainants.

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WHAT IS THE REASON FOR OUR LAW OF CONFESSION?—The case of *State v. Harrison*, 20 S. E. Rep. 175 (N. C.), raises an interesting question as to the admissibility of confessions obtained by promise of favor. The defendant, an ignorant and superstitious woman, was convicted of the murder of her husband. The court admitted in evidence a confession obtained from her under the following circumstances. A detective disguised himself and, pretending to possess magical powers, so worked on her superstition that she believed him. He told her, "If you will tell me all about it, I can give you something so you can't be caught." Whereupon she confessed that she was the one who had committed the murder. The court above held this evidence admissible, on the ground that the promise was not one that would be likely to induce the defendant to tell an untruth. If she were really guilty, it would be a strong inducement to her to tell the truth; but if she were not, there would be no incentive to tell a lie and say she was guilty.

One may fairly argue that the inducement held out might very well have led the woman to lie, in order to obtain the charm or talisman. She might think it of great value to her, even though she was innocent. But granting the court's position, that the favor promised was one that would induce none but a guilty person to confess, have we here the true test of admissibility? Are confessions obtained by promises of favor to be excluded for the sole reason that they lack credibility? There are numerous *dicta* to that effect. So Keating, J., in *Reg. v. Reason*, 12 Cox, 228; Littledale, J., in *Rex v. Court*, 7 C. & P. 486; and Coleridge J., in *Rex v. Thomas*, 7 C. & P. 345. But in none of these cases, or others hitherto decided, has it been necessary to go so far as to hold that the sole ground of exclusion. May it not be that the true ground is an aversion on the part of English-speaking peoples to the use in criminal cases of evidence obtained by such questionable means? May it not be from a spirit of fair play to the defendant? That would seem to be the reason why confessions obtained by threats are excluded. At all events, such a feeling has always had great influence on the minds of English and American judges. Whether it is wise to be so careful of the prisoner is another and larger question. Protests against such an excessive solicitude are not wanting to-day, and among them one may, perhaps, count this North Carolina case.

ADMISSION TO THE NEW YORK BAR.—In the latest rules of the New York Court of Appeals in relation to the admission of attorneys and counsellors-at-law, an important relaxation is noticeable in the rather draconic severity on this subject that has characterized that State. In the past, one year's study in a local office has been an indispensable and rather appalling requisite; but, according to the rules promulgated on October 22, that is now done away with, and different qualifications substituted in its stead. To entitle an applicant to an examination, he must now have studied law for three years, "except that if the applicant is a graduate of any college or university, his period of study may be two years instead of three." This requirement may be fulfilled "by serving a regular clerkship in the office of a practising attorney of the Supreme Court in this State after the age of eighteen years; or after such age, by attending an incorporated law school, etc., etc.; or by pursuing such course of study, in part by attendance at such law school, and in part by serving such clerkship." If the applicant be a graduate of a college or university, he must, however, have pursued the prescribed course of study *after* his graduation.

The effect of this change on our Law School will, undoubtedly, be a beneficial one. Men who have not been graduated from college can now prepare for New York Bar examinations, as quickly here as anywhere, while, since the two years' study required from college graduates must be *after* graduation, Harvard seniors will find a leave of absence from the college and three years' study here, their very best method of preparation. To all college graduates, also, now that the shadow of the local office rule has been removed, the Harvard Law School can offer as great facilities for expeditious preparation as any law school in the land.

CHANDELOR *v.* LOPUS. The case of *Chandelor v. Lopus*, a famous landmark of the law of deceit and implied warranty, is reported as of Trinity



Term, 1 James I., in Cro. Jac. 4 and in 2 Rolle Rep. 5. In Dyer, 75<sup>a</sup> (Treby's note), there is a report of an action between the same parties, stated to be of Trinity, 3 James I., which Vaillant, Dyer's editor, has with mistaken zeal assumed to be the same case. But in a MSS. volume of reports, 1-10 James I., in the Harvard Law School Library, Professor J. H. Beale has found a full report of this second case, which shows that after the failure, reported Cro. Jac. 4 and 2 Rolle, 5, Lopus tried again in 3 James I., with a new and stronger declaration. The following extracts are substantially the whole of this second case. The reader may be referred to Mr. R. C. MacMurtrie's article upon the case in 1 HARVARD LAW REVIEW, 191, "*Chandelor v. Lopus*," and to Professor Emlin McClain's article upon the history of "Implied Warranties in Sales," in 7 HARVARD LAW REVIEW, 212. It will be noticed that a difficulty about the case which Professor McClain speaks of is entirely resolved by the fact of the existence of two cases.

"Lopus brought an action on the case against Chandlor, and declared that the defendant . . . was possessed of a stone which he asserted and declared to the plaintiff to be a good and perfect stone called a Bezers Stone, . . . but, the said defendant, knowing that the stone was not good, *ut supra*, but a false and fictitious stone, asserted it to be good and of the nature and quality of a Bezer Stone, and the plaintiff thereupon being ignorant of the goodness thereof, the defendant sold the said stone . . . to the plaintiff, . . . to the damage of the plaintiff £200. To which the defendant demurred.

"*Heale* prayed judgment for the plaintiff, and said that in all bargains the law requires plainness, and will punish deceit in the vendor if he affirms more than is true of his wares even although he does not warrant them, as appears by the case of 9 H. V. 53, one shall have action on the case against one who sells corrupt wine even if there be no warranty in the bargain, if he knows that it is corrupt; and so is the case of 22 H. VII. 91.

"*Crooke*, to the effect that action on deceit lies even if there be no warranty, if the defendant knew the wares to be corrupt; that in 42 Ass. 8, pl. 8, an action on the case was brought against one for that he had stolen cattle and sold to the plaintiff as his own, and adjudged that it lies; and I have a case where one had forged a lease, and knowing it to be forged sold it to another as a good and sufficient lease, action on the case lies although there be no warranty; and it seems to me that the words here, *asseruit* and *affirmavit*, amount to a warranty, the defendant knowing that the stone was false. But if the vendor had been ignorant of this, no action lies doubtless.

"*Gouldsmith, contra*. . . . When one is selling wares it is lawful for him to say the best he can to raise the price, and although the vendee buy it at his price, if he has no warranty, or at least reliance on the promises and prices. An action on the case does not lie although he is deceived, for *caveat emptor* and the book of 42 Ass. 8, pl. 8, is expressly 'the plaintiff relying on the truth of the defendant,' and the book of 9 H. VI. 53 was for wine, which was bad victual prohibited by the law to be sold, . . . but for other commodity than victual no action lies without allegation of warranty, or at least of reliance on the vendor's promise.

"And later, in Trinity, 4 James I., this case was argued again by *Heale* for the plaintiff in effect as above.

"FENNER. If one purchases protection of delay of a suit and does not



have it for the term of protection, action on the case lies for the deceit. TANFIELD. That is, for deceit to the court of the King, and it is not in vain that in all the books of precedents for this action there is always a warranty expressed, and that should be annexed to the bargain, otherwise no action lies except for victual; . . . and if one asks of me whether my horse ambles or trots, and I say he ambles and in verity he trots, and we bargain, shall this man have an action? It seems not, for it was his own credulity which deceived him.

"POPHAM. This case is a dangerous case and may be the cause of a multitude of actions, if it be thought that the bare affirmation of the vendor causes the action; but that is not so, but there must be a *sciens* in the vendor that the vendee will not get the effect of his bargain, and with intent to deceive. So if I have a horse which is secretly wounded so that he cannot live more than a day or two, and I knowing this sell to J. S., and the horse afterwards dies, J. S. shall have an action on the case against me, for that I sold him a thing of which I knew he could not have the benefit; but if J. S. sells the horse over and affirms him to be sound, the second vendee shall not have an action since his vendor did not know that the horse was thus mortally and privily wounded; and if one sells goods to which he has no title knowingly, and they are taken by the owner, the vendee shall have an action, but if the vendee sells them again not knowingly, no action lies; and so in the case at bar, the principal matter is that the defendant, knowing the stone to be counterfeit, sold it to the plaintiff for a Bezers Stone when in the knowledge of the vendor the vendee could not have the profit. . . . The cause of action is the *sciens* that the stone was not a Bezers stone, and the selling with intent to deceive. . . .

In Michaelmas Term, 4 James, this case was moved again by *Heale*. POPHAM said that it was of such importance that he thought it proper that it should be considered by all the judges of England, for if it should be decided for the plaintiff it would trench on all the contracts in England, which would be dangerous. [He went on to restate the case and his prior opinion] . . . in every case there is no need of affirmation that the goods are the proper goods of the vendor, for that is implied in the sale.

"TANFIELD. I will reserve my opinion in the principal case, but doubtless it is agreed by all that if in this case '*sciens le defendant*' were omitted the plaintiff would not recover. . . . *Et adjournatur.*"

## RECENT CASES.

AGENCY—AGENT EXCEEDING HIS POWERS—SUBROGATION.—An agent with power to sell, but not to mortgage, mortgaged the lands of his principal, and without his knowledge or consent appropriated the proceeds to the discharge of a prior valid mortgage. *Held*, that the second mortgagee will not be subrogated to the mortgage discharged. *Campbell v. Foster Home Ass'n*, 30 Atl. Rep. 223 (Penn.).

On the ground of subrogation the case is clearly correct, since the doctrine is not applied in favor of a volunteer. Sheldon on Subrogation, sect. 240. It is suggested, however, that the principal, by accepting the payment of the first mortgage, has ratified the whole transaction, and plaintiff's mortgage is therefore valid. The principal cannot accept the benefit of the unauthorized acts of his agent, and refuse the burdens. See *Shoninger v. Peabody*, 57 Conn. 42; *Frank v. Jenkins*, 22 Ohio St. 597. As this point is not mentioned in the case, it is probable that it is not fully reported.

**CONFLICT OF LAWS—VALIDITY OF DIVORCE—DEFENDANT A RESIDENT OF ANOTHER STATE.**—A divorce obtained by a wife residing in Colorado against her husband, a resident of North Carolina, without personal service on the husband, held, to have no extra-territorial validity. *Harris v. Harris*, 20 S. E. 187 (N. C.).

This decision follows the early North Carolina case of *Irly v. Wilson*, 1 Dev. & B. Eq. 568, and attempts to distinguish *State v. Schlaeter*, 61 N. C. 520, which apparently overrules it. The decision in the principal case is in conflict with the weight of American authority, and the position of the North Carolina court is somewhat anomalous. While admitting that a wife may get a domicile apart from her husband for the purposes of getting a divorce, the court defeats the effect of the domicile when obtained. The reason for allowing a wife a domicile apart from her husband is that he may not defeat her right to sue by constantly changing his domicile. This object is defeated if the husband can, by removing from the State where the wife has obtained a domicile, and so getting beyond the jurisdiction of its courts, prevent the wife from getting a valid divorce. The position of the husband is somewhat peculiar; by the laws of his State he is a married man, but he has no wife, since she has been taken from him by the decree of a competent court. 2 Bish. Mar. Div. and Sep., §§ 152 et seq.

**CONSTITUTIONAL LAW—POLICE POWER—DOGS.**—A city council, under authority from the legislature to license dogs, passed an ordinance providing that if a dog attack a person at any place except on the premises of his owner, upon a complaint made to a police justice, if the latter is "satisfied of its truth and that such dog is dangerous, he shall order the owner to kill him immediately." Having refused to obey such an order, the relator petitioned the court to issue a writ of prohibition to compel the justice to desist in his efforts to enforce the prescribed penalty for the refusal. *Held*, the ordinance was void, as it deprived one of property without due process of law. The petition was therefore granted. *People ex rel. Shand v. Tighe*, 30 N. Y. Supp. 368.

That a dog is property within the 5th Amendment, has been often decided (*Jenkins v. Ballantyne*, 30 Pac. Rep. 760); but the authorities are in conflict as to the right to seize and confiscate such property without giving notice and granting a hearing to the owner, when there is no immediate danger to public health and public safety. Compare *Julienne v. Mayor*, 10 So. Rep. 43, and cases cited in Cooley, Const. Lim., 6th ed. p. 740, note 4.

**CONSTITUTIONAL LAW—POLICE POWER—EXCLUSIVE PRIVILEGES.**—The city of Omaha made a contract with defendant whereby he was to have the exclusive right to remove offal, dead animals, etc., from the city, paying therefor a certain sum to the city per annum. The matter of his charges was regulated also. Plaintiff, a taxpayer of Omaha, now seeks to have defendant enjoined from proceeding under this contract, on the ground that the making of the contract was unconstitutional, as the Constitution provides that "the legislature shall not pass any local or special laws . . . granting to any corporation, association, or individual any special or exclusive privileges." *Held*, the contract is good, as (1) the prohibition in the Constitution refers to the manner of granting such a franchise, and (2) this is not the granting of a franchise, but a valid exercise of the police power. *Smiley v. MacDonald*, 60 N. W. Rep. 355 (Neb.).

Regulations of this sort have been held to come within the police power in many instances. *In re Vandine*, 6 Pick. 187; *Walker v. Jameson*, 37 N. E. Rep. 402; *Dillon, Municipal Corporations*, §§ 141, 142; and the case is only interesting as showing another ingenious counsel trying to twist an exercise of the police power into a grant of a franchise, and then show the grant of that franchise to be forbidden by the Constitution.

**CONSTITUTIONAL LAW—POLICE POWER—RIGHT TO CONTRACT.**—A statute made it unlawful for any person or partnership to issue any policy of insurance against loss by fire without having first obtained a charter of incorporation authorizing the same. *Held*, the statute was a proper exercise of the police power, and was not in conflict with the Fourteenth Amendment of the United States Constitution, nor with the declaration in the State Constitution that all men have the inherent and inalienable right of acquiring, possessing, and protecting property. *Com. v. Vrooman*, 30 Atl. Rep. 217 (Pa.). Sterrett, C. J. Dean, Green, JJ., dissenting.

All the judges agreed that from the magnitude and nature of the insurance business, it was a proper subject for the exercise of the police power, and the Slaughter-house Cases (16 Wall. 36) were deemed conclusive as to the validity of the statute under the Federal Constitution. The chief point of dispute was whether the regulations of the Act were not practically prohibitive in forbidding insurance contracts by individuals. This presented a question of first impression to the court, and one upon which there was little or no authority directly in point. The majority, under a liberal construction



of the police power as one that "must necessarily enlarge its range as business expands and society develops," recognized that if the State wished to compel fidelity in the insurer and to provide a safe investment for the insured, the only way it could do so was by taking the business out of the hands of individuals over whom it had no visitatorial powers, and directing it into channels that would admit the necessary measure of control. The business itself was not prohibited, nor was any one excluded from engaging in it under the conditions imposed. The decision seems sound, and it also has the merit of approving salutary and progressive legislation.

CONSTITUTIONAL LAW — PUBLIC OFFICE NOT PROPERTY. — The governor was empowered by statute to appoint a superintendent of public instruction, and also to remove him from office for incompetency, neglect of duty, or malfeasance, without a trial in a court of law. *Held*, one removed from office under this provision is not deprived of property without due process of law. *Cameron v. Parker*, 38 Pac. Rep. 14 (Okla.).

Offices were one class of incorporeal hereditaments by the common law, and the incumbent could not be deprived of his property without the judgment of a court. 2 Black. Com. 36. But under our representative government a public office of legislative creation has never been so regarded. It is not viewed as the subject of a grant, nor even as a contract within the constitutional provisions protecting contracts. Throop, Publ. Officers, §§ 17, 19. The legislature may increase the duties, diminish the salary, abridge the term, or abolish the office, and still be within the provisions of the Federal and State constitutions forbidding legislative interference with property and vested rights. Cooley, Const. Lim. p. 331, note 2; Hare's Const. Law, p. 650.

CONTRACTS — CONDITION PRECEDENT. — In the sale of a horse, the defendant made a cash payment and agreed to pay an additional sum if the horse would go as fast as a horse of the defendant's, the test to be made within ninety days by a person named. *Held*, that the defendant was bound to pay the additional sum on evidence that plaintiff's horse was several seconds faster than the defendant's, though no trial had been made, owing to the sickness of the horses. *Dayo v. Hammond*, 60 N. W. Rep. 455 (Mich.).

The case seems wrong. The defendant at the sale distinctly said that a warranty of speed would not suffice, and made a test the condition precedent to his liability to pay the additional sum. This test became impossible through no default of the defendant, and it is hard to see on what ground he is obliged to accept the testimony of witnesses when he had expressly stipulated for a trial. In the case of *Potter v. Lee*, 94 Mich. 140, cited by the court in support of their view, there was a clear default on the part of the buyer, which makes the case not in point.

CONTRACTS — JOINT GUARANTORS — PAYMENT BY CHECK BY ONE GUARANTOR. — Defendant and Thomas jointly guaranteed plaintiff payment of a certain rent. The rent was not paid, and plaintiff took a check from Thomas. The check having been dishonored, plaintiff brought an action against Thomas on the check and recovered judgment, but this had never been satisfied. He then sued the defendant, and the question was whether the judgment recovered on the check given by one of the joint-contractors extinguished the cause of action against the other joint-guarantor under the guarantee. *Held*, it did not. *Wegg Prosser v. Evans*, 11 *The Times Law Rep.* 12.

The English Court of Appeals overrule *Cambefort v. Chapman*, 19 Q. B. D. 229, and follow *Drake v. Mitchell*, 3 East, 251, to reach this result. The court seem to have been confused in *Cambefort and Chapman*, as to the exact point of *Kendall v. Hamilton*, 4 App. Cas. 504. It was held in the last-mentioned case that if you sue one of two or more joint-contractors on the contract, you cannot afterward come against the other joint-contractors, the reason being that the judgment is the higher security, and your claim is therefore merged in that. In *Cambefort and Chapman*, however, the court said that *Kendall and Hamilton* was decisive of the case, and that it decided that "when you have converted the liability on the joint contract into a liability on a judgment so that you have a security of a higher nature, . . . then the maxim *transit in rem judicatam* applies." There can be no doubt that this is the decision of *Kendall and Hamilton*; but the court in *Cambefort and Chapman* applied this to a case like the principal one, and said that there the "liability on the joint contract had been converted into a liability on a judgment." This was a mistake, as the judgment was not obtained on the joint contract, but on something entirely collateral, *i. e.*, the check or note. This distinction is noted in the principal case, *Drake and Mitchell*, and *Dudley on Partnership*, 6th ed., p. 263.

EQUITY — INJUNCTION — PIRACY OF UNPUBLISHED LITERARY MATTER. — Where a newspaper obtained the plot and incidents of a play before public production by collusion with one of the actors and published the same, *held*, an injunction will



issue on prayer of the author to prevent further publication of the material so obtained. *Gilbert v. Star Newspaper Co.*, 11 *The Times Law Rep.* 4.

The jurisdiction of equity has been extensively invoked to prevent publication of private manuscripts of all kinds. *Story Eq. Jur.*, § 943. Nor is such material in any way less protected because it has not been copyrighted. In that case relief must be sought through the Federal courts, but the State courts will exercise their common-law powers without specific statutory authority. Spilling on Extraordinary Relief, § 880. The suitor is seeking protection against a threatened irreparable injury to a well-recognized right of property, and his title to an injunction is unquestioned. The English courts hold under their statute that a dramatic composition is published on its first presentation. *Boucicault v. Chatterton*, 5 Ch. D. 267. In America, however, it has been decided that a public presentation does not debar an author from applying subsequently for copyright for his play, or deprive him of his right to equitable relief in case of unauthorized publication. *Palmer v. Dewitt*, 47 N. Y. 532; *Tompkins v. Halleck*, 133 Mass. 32. In the principal case the play at the time of the publication complained of had not been seen by any one except the cast, and the author therefore was undoubtedly entitled to the injunction.

#### EQUITY—SPECIFIC PERFORMANCE—REMOVAL OF INCUMBRANCE PENDING SUIT.

—A contract for the sale of land to plaintiff provided for a deed containing full covenants with warranty; but before the delivery thereof a *lis pendens* in ejectment was filed against defendant, whereupon plaintiff refused to accept the deed, and brought a suit for specific performance. Before it came to trial, the defendant's title was cleared by a judgment in his favor in the ejectment suit. *Held*, that plaintiff is entitled to a decree of specific performance. *Haffey v. Lynch*, 38 N. E. Rep. 298 (N. Y.).

Where, in consequence of a defect in his title, the vendor cannot perform a contract to convey real estate, equity will not grant a decree of specific performance because the court cannot enforce its judgment. *Waterman on Spec. Perf.*, § 49. If a vendor has no title, or a defective title, to land which he contracts to sell, and subsequently obtains a perfect title, he can be compelled to perform his contract. *Fry Spec. Perf.*, 3d. ed. 480. If the vendor perfects his title while action for specific performance is pending, equity can enforce the decree, and therefore the only objection against granting it is removed. The court say (p. 300), "A perfect title by the vendor is no part of the vendee's cause of action, and he is just as much entitled to equitable relief, and the equity of the court is just as competent to give it, whether the title of vendor was perfected before or after the commencement of the action."

EVIDENCE—HOMICIDE—ADMISSIONS BY DEFENDANT INDUCED BY PROMISES OF SAFETY.—On an indictment for murder, an admission by defendant, an infirm and diseased old woman, that she caused a person to do the killing, made to a detective disguised as a stove-getter, and induced by his statement that he was a good monger-doctor, and by his promise that if she would tell him all about it he would give her something so that she could not be caught, *held* admissible in evidence. *State v. Harrison*, 27 S. E. Rep. 175 (N. C.).

The general rule is, that a confession is admissible in evidence, unless obtained by temporal inducement, by threat, promise, or hope of favor held out to a party in respect to his escape from the charge against him, by a person having authority over him. *Joy on Confessions*, §§ 1, 2. The reason for the rule as generally given is that confessions so obtained are not reliable, as the person making them is likely to confess some crime that he has never committed, in order to avoid difficulties. In the principal case the detective had no authority over the defendant when the confession was made, and his representations were not of a nature to induce an innocent person to confess a crime which he had never committed.

EVIDENCE—PRIVILEGE—REFUSAL TO TESTIFY.—Relator in this case was summoned as a witness before the grand jury in a criminal cause. In reply to questions propounded to him by the district attorney he testified, in the broadest terms, that he had no connection whatever with the transaction which was the subject of the inquiry. When, however, further and more particular questions were put, he refused to testify, claiming the privilege on the ground that the evidence would tend to criminate himself. For such refusal he was adjudged guilty of contempt by a justice of a court of oyer and terminer. *Held*, notwithstanding witness had testified generally that he was in no way connected with the criminal offence, yet where the circumstances are such as to place him in danger of a prosecution therefor, he may refuse to testify, on the ground that his evidence may tend to criminate him. *People ex rel. Taylor v. Forbes, Justice*, 38 N. E. Rep. 303 (N. Y.).

This decision is consistent with the established rule. *Chamberlayne's Best on Ev.* (inter. ed.), 537. The judge below seems to have attached great weight to the

fact that witness had previously testified that he was in no way connected with the matter. On this point the court say: "The witness, by answering the general questions as to his connection with the affair, whether his answers were true or false, did not wave his right to remain silent when it was sought to draw from him some facts or circumstances which, in his judgment, might form another link in the chain of facts, and capable of being used under any circumstances to his detriment or peril. . . . The witness, who knows what the court does not know, and what he cannot disclose without accusing himself, must in such cases judge for himself as to the effect of his answer." On the point as to whether the criminating quality of the question is to be left entirely to the determination of witness, see 10 Oh. 336, 1 Speers (S. C. 128, which hold that it is, and 2 Greene (Ia.), 532, 9 Wis. 140, 7 Tex. 215, *contra*.

EVIDENCE.—READING REPORTS TO JURY.—A telegraph company was sued for damages sustained on account of the non-delivery of a telegram, and in the course of the trial counsel for plaintiff read to the jury reports of Supreme Court cases to show that verdicts of a certain amount had been allowed by that court. *Held*, that this was wrongly permitted. *Western Union Telegraph Co. v. Teague*, 27 S. W. Rep. 958 (Tex.).

The Texas court has sustained a change of heart within a few years, as regards this matter. In *Railway Co. v. Lamothe*, 76 Texas, 222, this was said to be within the discretion of the trial court, and that the decision of the lower court would not be reversed unless a clear abuse of this discretion was shown, together with injury. In *Railway Co. v. Wesch*, 21 S. W. Rep. 62, the court said, again, that this was discretionary, but that they did not like it. In *Railway Co. v. Wesch*, 22 S. W. Rep. 957, they said it was error to allow this; and such seems to be the present law of Texas, as of most States. Such a holding is eminently desirable, as the reading reports of large verdicts must tend to increase verdicts which already are often too large, and the reports have absolutely no tendency to prove the amount plaintiff is entitled to recover in the case on trial. If it be argued that this is a matter of law, the answer is that in civil cases the counsel is not allowed to address the jury on matters of law, and, only in a few jurisdictions, in criminal cases.

PERSONS.—DIVORCE.—CRUELTY.—A wife, being infatuated with another man, so conducted herself toward him that she caused her husband to become unpleasantly notorious in the papers. She also neglected her household duties. The husband suffered mentally on account of this, and his health was impaired. *Held*, that this did not constitute cruelty so as to entitle the husband to a divorce; the actions of the wife not being wilful. *Ennis v. Ennis*, 60 N. W. Rep. 228 (Ia.).

While the decision of this case on all the facts is probably sound, still it is an interesting question how far the courts would allow a misguided husband or wife to continue this kind of behavior, though not malicious nor intended to injure the other party. It seems as if a point would soon be reached where the principle that a person must be presumed to intend the natural and probable consequences of his acts, would be applied, especially as divorce for cruelty is decreed as a protection to the injured party, and not as a punishment to the guilty one.

PERSONS.—MARRIED WOMAN AS HER HUSBAND'S PARTNER.—LIABILITY FOR FIRM DEBTS.—A married woman empowered to trade as a single woman, having formed a partnership with her husband, was sued for the debts of the firm. The defence set up was that the statute did not enlarge her powers toward her husband. *Held*, that the defendant, having held herself out to the world as interested in the business jointly with her husband, and as being therefore liable for the firm debts, cannot be allowed to set up that the contract between herself and her husband was invalid, in order to escape liability. *Louisville & N. R. Co. v. Alexander*, 27 S. W. Rep. 981 (Ky.). This case greatly extends the doctrine of estoppel of married women.

PRACTICE.—SUBPENA DUCES TECUM.—MESSAGES IN THE HANDS OF A TELEGRAPH COMPANY.—Under the general authority of the United States courts, a *subpœna duces tecum* will lie at the petition of the district attorney against the superintendent of a telegraph company, compelling him to produce telegraphic messages in aid of the investigation by a grand jury of supposed criminal acts of the senders and receivers. If the company is in no way personally interested, such messages are not privileged communications, and must be disclosed on the order of the court. *In re Storrer*, 63 Fed. Rep. 564 (Cal.).

This case is one of the many which trace their origin more or less directly to the railway strikes of last summer. The grand jury of the Federal Court for Northern California in their search for the party responsible for the delay of the United States mail, obtained the *subpœna* in question, and the opinion is filed in denying a motion to quash the same. The judgment in the principal case is supported by decisions in Maine,



West Virginia, Iowa, and the Federal courts, although Judge Cooley has dissented strongly from this view, holding that from public policy the inviolability of telegraphic correspondence should be as complete as that by mail, and that the fundamental principles of the common law as well as our own constitutional provisions should insure immunity from such disclosure. Constitutional Limitations (6th ed.), 371, note I., 18 Am. Law Reg. N. S. 65. The decisions of the American courts on this matter are reviewed by Hon. Henry Hitchcock in his address before the American Bar Association in 1879, in which he admits the power of the courts to call for such evidence, and suggests the need of stringent legislative provisions to guard this exceptional privilege from abuse. 5 So. Law Rev. N. S. 473.

**PROPERTY — DELIVERY OF DEED — EFFECT OF RECORD.** — A executed a deed of land to his wife and recorded it, keeping it meanwhile in his possession. The wife did not know of such deed until a long time after it was recorded. The grantor, who had reserved a life estate to himself in the deed, subsequently conveyed the land to another. *Held*, that it was not the grantor's intention that the recording of the deed should constitute a delivery thereof, so as to pass title to his wife. *Davis v. Davis*, 60 N. W. Rep. 507 (Iowa).

This is in accordance with the law in most, if not in all, States. *Maynard v. Maynard*, 10 Mass. 456. It is to be regretted that the presumption of delivery arising from recording a deed is not conclusive. One who records a deed ought to be estopped from denying that he intended it to operate as a delivery.

**PROPERTY — EMINENT DOMAIN — CONFLICTING PUBLIC USES.** — A city, under its general authority to lay out streets, attempted to run a street through a railroad yard, where to do so would require the removal of a turn-table, water-tank, engine-house, and coal-dock. *Held*, that the railroad and its structures being for the public use, the city could not, under its general right of eminent domain, establish an inconsistent use, although the railroad could have located its buildings on adjoining lands owned by it, and thus the two public uses might have co-existed. *C. W. & M. R. R. Co. v. City of Anderson*, 38 N. E. Rep. 167 (Ind.).

A contrary decision was reached in *Railroad Co. v. Lake*, 71 Ill. 263. It does not distinctly appear in that case, however, that the removal of any buildings was necessitated. In accordance with the doctrine of the principal case, are *Railroad Co. v. Williamson*, 91 N. Y. 552, and *St. Paul Union Depot Co. v. St. Paul*, 30 Minn. 359. See, also, Lewis on Eminent Domain, § 266.

**PROPERTY — FIXTURES — RIGHT OF REMOVAL — EFFECT OF NEW LEASE.** — Where a tenant who had the right to remove fixtures erected by him on the leased premises, accepted a new lease of the premises to begin at the expiration of the existing lease, and the new lease contained no reservation of the right to remove fixtures, it was *held*, that the right to remove was lost if not exercised during the first term, although the possession was continuous. *Wright v. Macdonell et al.*, 27 S. W. Rep. 1024 (Tex.).

This decision is in line with the great weight of authority — see cases collected in the opinion, — the only decisions to the contrary being *Kerr v. Kingsbury*, 39 Mich. 150, and *Second Nat. Bank v. O. E. Merrill Co.*, 34 N. W. Rep. 514 (Wis.). Yet there is much to be said upon practical grounds in favor of those two decisions. It seems absurd to compel a tenant who takes a new lease, and whose possession is continuous, to remove all fixtures before the expiration of the first term, and put them up again when he starts on the second. The necessity of such a proceeding would not occur to any one unacquainted with the law, nor would the necessity of reserving the right of removal in the new lease occur to the ordinary layman, especially since the tenant has the right to remove during the first term without any express stipulation to that effect. But it does not seem likely that those two cases will be followed outside their own jurisdictions in the face of the strong current of decisions the other way.

**PROPERTY — SUBTERRANEAN STREAM — RIGHTS OF SURFACE-OWNERS.** — Where a subterranean stream is known to have a defined course, and is tapped by several wells, some of them sunk by the defendant city for its water-supply, whereby plaintiff's supply was cut off, it was *held*, that such use by the city was for an artificial purpose; that no one owner can use for artificial purposes an unreasonable quantity of water to be determined by the circumstances of the case; that each having an equal right to the water, no one can so exercise his right as to wholly deprive another of its use. *Willis v. City of Perry*, 60 N. W. Rep. 727 (Iowa).

This rule has become well established, though, from the nature of the facts, cases in its support must be comparatively rare.

**PROPERTY — WILLS — INTEREST ON LEGACY.** — *Held*, that a legacy given to a wife in lieu of dower draws interest from date of testator's death, in the absence of anything in the will showing a contrary intention. *Stevens v. Stevens*, 30 N. Y. Supp. 625.



This exception to the general rule, that interest on a legacy does not begin to run until one year from testator's death, is well established in New York and Massachusetts, but has not obtained a footing elsewhere. The United States courts, England, Pennsylvania, and New Jersey have refused to recognize it. On principle, there is not the same reason for allowing interest in this case as in the case of a legacy for the maintenance of children; for the wife, having her election to claim dower, or the legacy if she chooses the latter, ought to take it as any other adult legatee would.

PROPERTY — WILLS — PROOF OF EXECUTION. — A will was signed in handwriting not testator's. It was attested by the requisite number of witnesses, before whom testator had acknowledged it to be his will. *Held*, that there was evidence from which a jury might find that the will was signed by a third person in testator's presence, as required by statute, MacFarlane, J., dissenting. *Walton v. Kendrick*, 27 S. W. Rep. 872 (Mo.).

The reasoning of the majority is that an acknowledgment of the will to attesting witnesses is just as effectual to prove that the will was signed by a third person in testator's presence as that it was signed by testator himself. This is unsound. The acknowledgment only makes out a *prima facie* case that testator signed the will; and if there is evidence, as here, that testator did not sign, then the proponent of the will is under the duty of establishing that he did sign or did what was by statute equivalent to signing. This, proponent has here utterly failed to do, having offered no evidence at all having the slightest tendency to prove the execution.

TORTS — CONTRIBUTORY NEGLIGENCE. — *Held*, that certain facts, although strong evidence, do not constitute contributory negligence *per se*. Doctrine of comparative negligence repudiated. *North Chicago St. R. Co. v. Eldridge*, 38 N. E. Rep. 246 (Ill.). See NOTES.

TORTS — IMPUTED NEGLIGENCE. — In an action for injuries to the plaintiff's wife, caused by negligence of defendant company together with the negligence of the wife, *held*, that in a State where the wife has been released from her common-law restrictions, and the husband from all responsibility for the wife's torts, her contributory negligence will bar the husband's action. *C. B. & Q. R'y Co. v. Honey*, 63 Fed. Rep. 39 (Iowa).

The Circuit Court of Appeals reverse the decision of the Circuit Court in this case, which was reported in 59 Fed. Rep. 423, and was mentioned among the recent cases, 8 HARVARD LAW REVIEW, 63.

TORT — NEGLIGENCE — ACTION TO RECOVER DAMAGES FOR PERSONAL INJURIES. — An action to recover damages for injuries received through the negligence of a railway porter is an action founded on tort within the meaning of the County Courts Act. *Taylor v. M. S. & L. R'y*, 11 *The Times* Law Rep. 27.

This case furnishes an illustration of the difficulties which frequently confront judges in the application of legislative innovations in procedure. Every one knows that there is a border-land between torts and contracts, and that the best minds may differ as to the division in which a given case properly falls. The progress of assumption and of detinue from the one fold to the other is a good example of the yielding nature of their boundaries. Pollock on Torts, Appendix A. But in the English County Courts Act of 1486, the antithesis is sharply drawn, and costs taxed differently as the action is "founded on contract" or "founded on tort," and this distinction is preserved in all the amendments of the Act. The judges are therefore called upon repeatedly to say whether causes sound in contract or tort which may belong in either or neither, and to settle questions which could not have arisen at all under the old forms of action. In the present case the decision seems clearly correct. There is no reason why a railway should escape liability in tort for active misfeasance because it happens to be liable also in contract, if the passenger prefers to put his case upon that ground; and as in modern English procedure the nature of the complaint is gathered from the statement of facts, the plaintiff should be entitled to that construction most favorable to himself. It is by no means clear, however, that misfeasance by a common carrier may be regarded as a tort at election; and there is eminent authority to the effect that such injury is in its nature essentially a breach of contract. Holland on Jurisprudence, 222, 223.

TORTS — NEGLIGENCE — BURSTING SEWER — LIABILITY OF CONTRACTOR. — Defendant, a sewer contractor, agreed that the work should be performed in accordance with certain plans, and that the city engineer should have supervision and management of the construction, — the city reserving not only the power of changing the specifications as the engineer should see fit, but also a control over the manner of performing the work. The construction-trench was lined with planking to prevent caving. The

brick-work having been completed, the engineer directed that the planking remain in place, and that the trench be filled by puddling, and not by tamping, as required by original contract. His directions were followed, and, the earth having subsequently settled, a service-pipe was wrenched from its connection at the main by the pressure of the planking upon it. Four months later, the sewer having been completed and accepted by the city, the street caved in, and serious damage was found to have been done to the foundation of plaintiff's church, by the water flowing from the main and the sewer, which was found broken at that point. The cave-in was the first indication of any defect. Plaintiff sought to charge defendant as an independent contractor; but it was *held*, that he did not bear that relation to the city, since it reserved not only the power to direct as to the results of the work, but also the control over the manner of performing it, and had directed that the planking remain. As an additional *ratio decidendi*, the court applies the rule of *Curtin v. Somerset*, 140 Pa. St. 70, where it was held that an independent contractor owes no duty to third parties after the work has been taken off his hands by the owner. The causal connection between the contractor and the third party, in the event of damage, is taken to have been broken by the interposition of an independent responsible agent (Whart. Neg. §§ 438, 439), and contractor is not liable to such third party. *First Pres. Cong. v. Smith*, 30 Atl. R. 279 (Pa.).

By adhering to *Curtin v. Somerset*, the Pennsylvania court again affirms the doctrine for which the case of *Winterbottom v. Wright*, 10 M. & W. 109, is usually taken to stand. In England, a disposition has been shown to avoid the hardship of so strict a rule (*George v. Skivington*, L. R. 5 Ex. 1; *Heaven v. Pender*, L. R. 11 Q. B. D. 503); and the same is true of several jurisdictions in this country. See *Blood Balm Co. v. Cooper*, 83 Ga. 457; *Shubert v. Clark Co.*, 51 N. W. R. 1103 (Minn.). The New York case of *Thomas v. Winchester* (6 N. Y. 397) might seem a departure from the strict rule, but the effect of that case was limited by two later decisions in the same jurisdiction. *Loop v. Litchfield*, 42 N. Y. 351; *Losee v. Clute*, 51 N. Y. 494.

**TORTS—NEGLIGENCE—DUTY OF CONTRACTOR TO ONE NOT A PARTY TO THE CONTRACT.**—The defendant agreed with a company to furnish staging for work which the company was to do on defendant's elevator. Deceased was killed by a fall caused by a defect in the staging, while he was thereon in the employ of the company. In an action by his administrator, it was *held*, that the defendant owed a duty to the deceased to exercise reasonable care, because there was an implied invitation to him to use the staging, and because there is a duty on every one to avoid acts imminently dangerous to human life. *Bright v. Barnett & Record Co.*, 60 N. W. Rep. 418 (Wis.).

The facts of this case are in effect those of *Heaven v. Pender*, L. R. 11 Q. B. Div. 503, cited by the court; and the decision is put on the same grounds, either of which seems sufficient to support it. The second principle, however, is too broadly stated, and must be taken with reference to the facts. It is a case of the first impression in Wisconsin, though abundant authority is cited from other jurisdictions.

**TORTS—NEGLIGENCE OF MASTER—DUTY TO GUARD DANGEROUS MACHINERY—WAIVER.**—Laws 1892, c. 673, require machinery to be properly guarded, and provide that a neglect so to guard shall be criminal. Plaintiff, who had worked in defendants' factory some two years, was injured, in the course of his employment, by having his hand caught in a gearing. The jury answered the question as to contributory negligence and as to the sufficiency of the guard, in plaintiff's favor. It was *held*, that the plaintiff could recover, and that he could not waive the statutory protection. *Simpson v. New York Rubber Co.*, 30 N. Y. Supp. 339.

The decision as to the latter point goes upon the ground of public policy, and the case is taken as analogous to those arising under the usury statute, and also under the statute regulating the charges for elevating grain. It is admitted that "a servant accepts the service subject to the risks incident to it," and where, upon entering the employment, the machinery is of a certain kind and condition, to employee's knowledge, he voluntarily assumes the risk involved in their use, "and can make no claim on the master to furnish other or different safeguards" (*Sweeney v. Envelope Co.*, 101 N. Y. 520). It is also admitted that parties can waive statutory provisions for their benefit, and can even make law for themselves which the courts will enforce, provided it is a matter exclusively of private right, and there is not, as here, a question of public policy involved (*Sentemis v. Ladew*, 140 N. Y. 463). It is important to notice that Dykman, J., merely concurs in the result; while Brown, P. J., does not agree that an employee cannot waive the statute, so far as it may be treated as having been enacted for the employee's benefit and protection, though he concurs in affirming the judgment. He points out that the rule laid down excludes not only waiver by continued use, but also waiver by express stipulation, and refuses to express an opinion upon it. On the whole, the case is not a strong authority for the proposition enunciated.



**TORTS — TELEPHONE WIRES — INTERFERENCE BY OTHER WIRES — INJUNCTION.** — A telephone company received a franchise under which it erected poles and strung wires along the streets. Three years later, a like authority was given to and acted upon by an electric-lighting company, to the serious impairment of the telephone service. It was found that the wires of the two companies were within four feet of each other, that there was sufficient room along the streets for the lighting company to string its wires at a distance greater than four feet, and that such alteration on the part of the lighting company would be attended with greater expense than one on the part of the telephone company. It seems also to have been found that a space of four feet or more between wires would have obviated the difficulty. An injunction issued in favor of the telephone company, the lighting company being compelled to make the changes above indicated, on the ground of priority only, it would seem, as no cases are cited. *Paris Electric Light, &c. Co., v. S. W. Telegraph, &c. Co.*, 27 S. W. Rep. 902 (Tex.).

The question whether, of two corporations using electric currents of varying powers, the more recent, if using the stronger, shall so carry on its business as not to impair the service already existing, or whether the one suffering from the proximity shall, in all cases, make at its own expense all changes necessary to the maintenance of its service, can hardly be said to be as yet settled. Contests between telegraph or telephone companies and electric-lighting companies have seldom risen to the higher courts, their difficulties being settled at a comparatively slight cost to either party. *Neb. Tel. Co. v. York Gas, &c. Co.*, 17 Neb. 284, accords with the principal case; while *West. U. Tel. Co. v. Champion Electric Co.*, 14 Cinc. W'kly Bull. 327 (Ohio), is *contra*.

A more serious contest, from the nature of the service, has arisen between the telephone companies and the electric street railway companies. The authorities are conflicting, and are collected in Thompson on Electricity, pp. 52-58, and especially in Keasbey on Electric Wires, pp. 141-153, where the matter is elaborately discussed.

**TRUSTS — APPLICATION OF TRUST-RES AT DISCRETION OF TRUSTEE.** — Testator gave his property to trustees upon certain trusts, and directed the trustees to invest certain sums for the benefit of his sons, and apply these sums to the advancement of the sons, as the trustees in their discretion should think fit. *Held*, that the sons were absolutely entitled to the legacies, freed from the exercise of any discretion on the part of the trustees. *In re Johnston*, L. R. [1894] 3 Chan. Div. 204.

This follows the rule that where the trustees are to apply the entire amount for the benefit of the cestui, the bequest is to be treated as a gift out and out.

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## REVIEWS.

**COURTS AND THEIR JURISDICTION.** By John D. Works. Cincinnati: The Robert Clarke Co. 1894. 8vo. pp. 908.

The task Judge Works has set himself, the fulfilment of which gives us this book, is one that has been immensely complicated by the great number of statutes and provisions in the constitutions defining the powers of the various courts. One constantly is reminded of this by the qualifications the author feels himself compelled to put on various statements, to the effect that "the tendency of legislation" seems to be against this or that. Yet out of the chaotic mass of decisions and legislative directions on the subjects treated, he has given us a *résumé* of the doctrines laid down, with a good discussion of the principles on which the various theories are based. The author candidly admits that many of the cases go on no principle at all save that of precedent, but states as the object of the work, "to get below this mass of cases which rest upon one another, and find out why a given principle of law should be maintained, and cite the cases by which the reason for the rule has been established." On this very commendable plan he has treated the means of acquiring and losing jurisdictions, jurisdiction of judges,



venue, and common law, equity and statutory jurisdictions in the civil and criminal sides of the court, and in the various actions and suits. The subjects are interestingly dealt with, and the book seems a good one for the student as well as the practitioner. Authorities are cited to a sufficient extent to render the treatise a valuable one to the practising lawyer; but it is more than a collection of authorities. J. S. S. JR.

AMERICAN CASES ON CONTRACT. Arranged in Accordance with the Analysis of Anson on Contract, and edited by Ernest W. Huffcutt and Edwin H. Woodruff. New York and Albany: Banks & Brothers. 1894. 8vo. pp. xxxiii, 718.

The object of this volume is, as the editors state, to illustrate the essential principles of the law of contracts by selections of American cases. The theory on which English decisions are excluded, however, hardly seems a wise one. Certainly the judgments of the House of Lords have as much authority in this country as those of many of our own tribunals. Surely, too, in some English cases, at least, a more satisfactory statement of the doctrine to be brought out might have been found than in parallel American ones; and in such a situation it is hard to see a good reason why the worst exposition should be preferred to the better, simply because it is American. In spite of this bias, however, the editors have gathered in a comparatively small space a number of well-chosen cases, which, while not straying off into the kindred branches of agency, partnership, etc., cover in a broad way the entire field of their subject. In fact, something might have been gained from the student's point of view if the book had aimed to be less comprehensive, and had endeavored to cast more light, by a larger array of cases, on some of the less settled topics of the law. This defect, however, seems one inherent in the nature of the task, and, considering how admirably much is covered in little space, the failure to emphasize more fully dubious points is not to be wondered at.

D. A. E.

HARVARD COLLEGE BY AN OXONIAN. By George Birkbeck Hill, D. C. L., Honorary Fellow of Pembroke College, Oxford. New York: Macmillan & Co. 1894. 8vo. pp. x, 329. Cloth, \$2.25.

Mr. Hill's errors, though numerous and almost always amusing, are never more than mere slips; and he may be congratulated upon his success in giving a truthful and human account of Harvard where the writers before him have almost entirely failed. There is just enough comparison with Oxford to give spice and point to his criticism and appreciation.

The chapter on the Law School is accurate in its account of the history of the school, and most generous in praise. Its concluding paragraph is this well-turned compliment: "Daniel Webster, in one of his speeches, looks forward to the time when America shall repay to Europe the great debt of learning which she owes her. The repayment to England has already begun; all that we have to do is to stretch out her hands and to gather in the fruits of Harvard's experience in the method of teaching law" (p. 265). Later on, Mr. Hill says: "I trust that before long many a scholar fresh from Oxford and Cambridge will cross the Atlantic to finish his studies in Harvard" (p. 327). It would be very pleasant for the Law School if some Oxford or Cambridge graduate should read these two passages together, and act on this advice. He

would find the Law School a school of the Common Law, not merely of American local law; and one cannot see why it should not do as good service in fitting for the English bar as for that of any State.

R. W. H.

A TREATISE ON THE FOREIGN POWERS AND JURISDICTION OF THE BRITISH CROWN. By William Edward Hall, M. A. Oxford: Clarendon Press. 1894. New York: Macmillan & Co. 8vo. pp. xvi, 304. \$2.60 net.

In view of the great number of British agents who exercise judicial or quasi-judicial power in foreign countries, it is remarkable that there has heretofore been no systematic discussion of their powers. This lack has been supplied by this excellent summary, the principal defect of which is its brevity and its lack of details and illustrations of the actual business and workings of the British Consular Courts. Such courts have recently acquired a new interest from the extension of British Protectorates and "Spheres of Influence," and from the fact that Great Britain is now voluntarily abandoning its right to maintain them in Japan.

The book contains a good summary of the consular jurisdiction, and of the status of the various classes of British subjects, both in foreign, civilized, and in barbarous countries, including the complex subject of international marriage. The legal reader will regret the meagreness of the citations of authority, which the author explains, however, on the ground that he is indebted for much material to persons in official positions, whose authority official etiquette prevents his acknowledging.

E. L. C.

WAMBAUGH'S STUDY OF CASES. By Eugene Wambaugh, LL.D. 2d ed. Little, Brown, & Co. 1894. pp. xviii, 333.

WAMBAUGH'S CASES FOR ANALYSIS. By Eugene Wambaugh, LL.D. Little, Brown, & Co. 1894. pp. x, 549.

The second edition of Professor Wambaugh's valuable guide to the study of cases is accompanied by a volume of cases supplemental to those printed with the text of the original book. The value of the "Study of Cases" as a preliminary to the "Case-system" as it is practised in this school might be very great, and it would be certainly a very wise training for any student who is to find himself plunged into the midst of things at the beginning of his course here. Obviously the method of studying cases to best advantage ought itself to be best grasped by a study of cases, and an induction of the best method of induction is but a logical outcome of the "Case-system." The "Cases for Analysis" are meant to give a field for just such induction, while the cases are also arranged to give some idea of the fundamental principles of Contracts and Torts. The amount of ground covered in these two subjects is considerable, and it may possibly be questioned whether in this respect the selection of cases is not too comprehensive for its size and purpose.

B. L. H.

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## LEASE OF RAILROAD BY MAJORITY OF STOCKHOLDERS WITH ASSENT OF LEG- ISLATURE.

[THE following notes were made with a view to preparing an opinion in *Dow v. Northern R. R., et als.*, decided some time since in the Supreme Court of New Hampshire, and not yet reported. Notes on another point investigated in this case were printed in 6 HARVARD LAW REVIEW, 161-183, 213-222.

The facts may be briefly stated as follows: The Northern Railroad was chartered in 1844. The corporation was authorized to construct, and keep in use, a railroad from Concord to Lebanon. Section II provides that "The Legislature may alter, amend or modify the provisions of this Act, or repeal the same, notice being given to the corporation, and an opportunity to be heard." Chapter 100, Sect. 17, Laws of 1883, enacts that "Any railroad corporation may lease its road, railroad property, and interests to any other railroad corporation," upon such terms, and for such time as may be approved by a two-thirds vote of the stockholders of each corporation. It was assumed that the Northern Railroad had notice of the proposed passage of this statute. On June 18, 1884, the stockholders of the Northern Railroad, by a vote of more than two-thirds, approved a lease to the Boston & Lowell R. R. On the same day, pursuant to this vote, the Northern Railroad, by its President, executed to the Boston & Lowell R. R. a lease, for ninety-nine years, of the railroad, rolling stock, etc., of the lessor; the lessee to pay a quarterly rental, and perform various other covenants. Dow and Robertson, stockholders in the Northern Railroad, voted against approving the lease; and seasonably filed a bill in equity, praying that the Boston & Lowell R. R. be enjoined from operating the road under the lease, and that the Northern Railroad and its directors be ordered to assume the management of the road.



A decree was made granting the prayer of the bill; three Judges concurring and one dissenting.

These notes are published at the request of the Professor having charge of the Department of Corporations at the Harvard Law School. —EDITORS.]

THE Northern Railroad is the name of "a collection of many individuals, united into one body," with certain rights and duties.<sup>1</sup> A private business corporation is "an association formed by the agreement of its shareholders," and its existence "as an entity, independently of its members, is a fiction." It is "essential to bear in mind distinctly that the rights and duties of an incorporated association are, in reality, the rights and duties of the persons who compose it, and not of an imaginary being."<sup>2</sup> "The statement that a corporation is an artificial person, or entity, apart from its members, is merely a description, in figurative language, of a corporation viewed as a collective body: a corporation is really an association of persons."<sup>3</sup> . . .

By the first section of the Northern Railroad charter<sup>4</sup> it is enacted "That Timothy Kenrick" and twenty other persons, "their associates, successors, and assigns, shall be and hereby are made a body politic and corporate by the name of the Northern Railroad." Here is no evidence of an attempt to introduce a mystery, or to create a fictitious being, to whom the State can give neither body nor mind. The stockholders are the corporation. They have the entire equitable title and beneficial interest of the property by them put in the corporate trust; and they are the corporate trustee in whom is vested the legal title. All of them, assembled at their annual meeting, choosing their seven directors by ballot, and exercising their stockholding rights in any other legal act, would be the visible body, and the acting mental and moral faculty, whose partnership name is the Northern Railroad. They are made a body, not by the Legislature, but by their own several acts of becoming stockholders and joint principals. Under the common law, without a charter, they can form a partnership body by becoming stockholders and joint principals in the business of a stage-coach common carrier between Concord and Lebanon. Under general law, without a special act of incorporation, if a majority of them are inhabitants of this State they can make themselves a railroad corporation.<sup>5</sup> "May associate them-

<sup>1</sup> Kyd, Corporations, 13.

<sup>2</sup> Morawetz, Corporations, *Preface*.

<sup>3</sup> Morawetz, § 227.

<sup>4</sup> Laws, 1844, ch. 190.

<sup>5</sup> Laws, 1883, ch. 100.

selves together, by written or printed articles of agreement, for the purpose of forming a railroad corporation," is the language of the Act. They are no more made a body by the law than they would be if they should form a corporation under the Act of 1883, or an unincorporated partnership under the common law. Whether they are incorporated or not, their company is formed by their contract with each other, and it has such powers and duties as the law allows them to give it, and such as the law grants and imposes. For whatever legal purposes their corporate body may be regarded as unreal, the fiction does not vest all the property in an imaginary being, and does not make the shareholders owners of an imaginary capital stock, for the purpose, or with the consequence, of giving to the majority of them, or to the State, a leasing power which the majority or the State would not have if the partnership were not incorporated.

As the plaintiffs could assent to the lease only in person, or by some agent or agents, and as they have not personally approved it but have seasonably opposed it, one question is whether, by becoming stockholders, they conferred a general leasing power over their shares upon a majority of the corporation. Whether the agents' power given by the plaintiffs to the majority is now regarded by either of those parties as too much or too little, it cannot be revoked or diminished by the minority, or increased by the majority. Neither party have any legal cause of complaint against their own agreement. If the plaintiffs are dissatisfied with the control they have given the majority as their agents, they can withdraw from it by the simple process of selling their shares; if the majority are embarrassed by the need of a larger agency, they can liberate themselves by the same process. The question, whether each of the plaintiffs, by the act of buying a share, gave the majority a general leasing power over that share, is not affected by the circumstance that such power, if given by him, could not be lawfully exercised until the State consented, as it did by the Act of 1883, to accept the lessees as substitutes for the lessors in the performance of the lessors' public duties. But the extent of the power vested in the majority may be obscured by overlooking the widely different origins of that power, and the distinction between the stockholders' private property which they did not receive from the State, and the public rights which they exercise as State agents. Eminent domain not being exercised over the plaintiffs' shares, it is necessary to observe the difference between

that private authority over each share of the private property which its owner alone can give the majority, and that public agency which the public alone can give them.

The lease of the Northern to the Lowell is an attempt to compel the plaintiffs, dissenting stockholders of the Northern, to exchange, for ninety-nine years, all their interest in the Northern for an annuity, secured by a right of entry, practically equivalent to a mortgage enforceable by strict foreclosure. The possibility of a non-payment of the annuity, and a resumption of the carrier business by the Northern, has no bearing on the question of the validity of the exchange of that business for the annuity. This question is to be decided on the possibility and the presumption that the Northern will have no occasion to resort to its security. The circumstance that the money to be received by the Northern is divided into many sums, due at different times, is immaterial. The law of the case is what it would be if the price paid for the estate of ninety-nine years had been paid in a single sum before the purchaser took possession of the road, and the security given were merely for the performance of covenants not relating to the payment of the price. The payment of the whole price in one sum, and the division of it among the Northern stockholders, would leave them members of their corporation and owners of an estate in remainder. Instead of being a step in a process of dissolving the Northern company, and winding up its affairs, the lease requires that company to "keep up and preserve its organization." Whether each stockholder's share of the price of the estate sold is paid to him in one sum at one time, or in many sums at many times, the sale of the road for ninety-nine years is not a provision for the Northern company's working the road, which, by the terms of the sale, is to be worked during that time, not by the Northern and the Lowell as joint principals, nor by the Lowell as agent of the Northern, but by the Lowell for the Lowell as sole principal.

"If the directors of the Concord Railroad should vote to build a line of telegraph on its road from Nashua to Concord, and stockholders should ask an injunction against the execution of the vote, one question would be, whether a telegraph line is reasonably necessary for working the road and carrying into effect the purposes of the charter. It would be largely, if not wholly, a question of fact."<sup>1</sup> But a vote of the directors and a majority of the stock-

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<sup>1</sup> *Burke v. Concord Railroad*, 61 N. H. 160, 244.



holders to exchange all their corporate property for a telegraph line of equal value, and to change their business from that of a common carrier of persons and chattels to that of a telegraph company (the State waiving any objection it might make), would present no question of fact on which it could be held that a dissenting minority were bound. The telegraph business, taken in exchange for the railroad, could not be a mode or means of the Concord company's carrying on the railroad business, which, by the exchange, that company would abandon. On the question of incidental power, it would be immaterial whether the exchange were for ninety-nine years or for all time. In many cases the question whether a proposed change would be an exercise of an instrumental power, — a power of carrying into effect the purposes of the charter, and accomplishing the objects for which the corporation was formed, — is a question of fact. Can the Northern company buy one coal-mine or wood-lot for the purpose of obtaining fuel for their own use, and another for the purpose of carrying on the business of a coal or wood merchant? Can they build one shop for the purpose of making rails, bridges, and rolling-stock for their own use, and another for the purpose of making them for market? Can they erect a station twice as large as they now need, if its erection is economical and judicious in view of the future demands of their increasing traffic? When they have, judiciously or injudiciously, erected such a station, can they let half of it to a shoe manufacturer for three years, at the end of which time their railway business will probably require the whole; or must they suffer the loss of three years' income of half because a stockholder denies their power to make a lease? Many questions of combined law and fact cannot be answered with legal precision until their component parts are separated, and the facts are found. As a matter of fact, is the proposed corporate act a mode or means of the company's carrying on their business of transporting passengers and freight on their road between Concord and Lebanon? However difficult this question may sometimes be, some progress is made towards an intelligent decision when we cease to be confused by a blended mass of law and fact in a general question of corporate power, and begin to inquire what evidence there is on the question of fact. There is no evidence tending to show that, as a matter of fact, the lease of the Northern road is a mode or means of the Northern company's carrying on the business, which, by the lease, that company abandon for ninety-nine years; and the law of the case is not the opposite of the fact.

"The transaction in question was a purchase by the one company of the good-will and the whole concern of the other. That would, ordinarily speaking, be a transaction in which no company would be justified in engaging, because it certainly cannot be said to be within the ordinary scope of the object of any company to purchase the good-will of another." "The principles of law upon which the liability of joint stock companies is to be decided, as far as is necessary for the decision of this case, are very clear and perfectly well settled, though not always in practice steadily kept in view. The law in ordinary partnerships, so far as relates to the power of one partner to bind the others, is a branch of the law of principal and agent. Each member of a complete partnership is liable for himself, and, as agent for the rest, binds them upon all contracts made in the course of the ordinary scope of the partnership business. . . . It is obvious that the law as to ordinary partnerships would be inapplicable to a company consisting of a great number of individuals contributing small sums to the common stock, in which case, to allow each one to bind the other by any contract which he thought fit to enter into, even within the scope of the partnership business, would soon lead to the utter ruin of the contributories. . . . The Legislature, then, devised these companies, in a manner unknown to the common law, with special powers of management and liabilities, providing at the same time that all the world should have notice who were the persons authorized to bind all the shareholders, by requiring the copartnership deed to be registered, certified by the directors, and made accessible to all."<sup>1</sup>

In an ordinary partnership, each member is an agent as well as a principal; his liability for the partnership debts is unlimited, and he cannot expose his associates to a new risk by transferring his agency to an assignee of his share. In this State any number of persons, however large, may form such a partnership; and however obvious the hazard arising from the number and character of the members, in each of whom an agency is vested, the law of ordinary partnerships is applicable to the firm. They may diminish the risk by conferring the agency (not upon each member, but) only upon a concurring majority, or upon a board of directors chosen by major vote, or upon one manager chosen by themselves, or by directors. They may think this diminution of risk sufficient

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<sup>1</sup> *Ernest v. Nichols*, 6 H. L. C. 401, 414, 417, 418, 419.

to allow a share to be sold and conveyed by a transfer of a certificate introducing a new partner. Even if a part or all of their property is real estate, a statute can authorize this mode of conveyance, and make the shares personal property for the purposes of sale, pledge, attachment, levy of execution, descent and bequest, without incorporation. In many cases of common-law unincorporated partnership, the contract has provided for an unlimited succession and duration by making the shares transferable: without a dissolution of the firm, and without a termination of its agency, membership passed, with the shares of a living member, to his vendee, and with the shares of a deceased member, to his legatee, executor, or administrator; and the general agency was vested (not in each member, but) in the majority of successive members, or a board of directors, or one manager, or in directors or a manager subject to such instructions as the majority of the successive members might see fit from time to time to give.<sup>1</sup>

Limited partnerships, formed for other purposes than banking or insurance, "may consist of one or more general partners, who shall be jointly and severally responsible, and of one or more persons, . . . who shall be called special partners, and shall not be personally liable for any debts of the partnership."<sup>2</sup> By similar legislation operating prospectively, the liability of all partners can be limited to their partnership property, without (as well as with) acts of incorporation. The Northern Railroad charter provides that "This corporation shall hold and enjoy the privileges and franchises herein granted, subject to the laws in relation to corporations and railroads as they now stand in the Revised Statutes of this State."<sup>3</sup> The stockholders of an incorporated "company having for its object a dividend of profits . . . shall be personally holden to pay the debts . . . of such company, . . . in the same manner and to the same extent as though the stock were owned and the business transacted by the stockholders as unincorporated copartners."<sup>4</sup> "There is no limitation . . . to the general liability of the stockholders to pay all the debts of the corporation, as set forth in the first section, if the proper steps are taken to charge them."<sup>5</sup> In a limited partnership not incorporated, a spe-

<sup>1</sup> *Tappan v. Bailey*, 4 Met. 529, 530, 536; *Tyrrell v. Washburn*, 6 Allen, 466, 467, 468, 472, 474, 475, 476; *Skinner v. Dayton*, 19 Johns. 513, 539, 540, 557, 560, 563, 570. In a partnership contract, the members have called themselves stockholders. *Farnum v. Patch*, 60 N. H. 294, 295.

<sup>2</sup> Gen. Laws, ch. 118, §§ 1, 2.

<sup>3</sup> Laws, 1844, ch. 190, § 10.

<sup>4</sup> Rev. St., ch. 146, § 1.

<sup>5</sup> *Chesley v. Pierce*, 32 N. H. 388, 400.



cial partner is not personally liable for any debts of the firm. By the Revised Statutes and the charter of the Northern Railroad, each member of that incorporated partnership was personally liable for all the debts of the firm. Under the subsequent modification of the personal liability law,<sup>1</sup> that company did not cease to be an incorporated partnership. Before the liability of the stockholders was limited, they were joint principals in the business of a common carrier on their road between Concord and Lebanon, sharing the profits and losses of that business; and such principals are partners.<sup>2</sup> Since their liability was limited, they have been joint principals in the same business, sharing all the profits and all the losses that have happened. They have shared all the profits and all the losses because they have been partners. They are partners, not because they share profit and loss, but because the business is theirs, and is carried on for them by their agents.<sup>3</sup> Their partnership relation was not extinguished by the statutory limitation of the amount of loss they are liable to share. Whether incorporated or not, a partnership may be limited in respect to liability as well as agency.

The Northern Railroad, though not originally limited as to personal liability, was limited as to the number of partners authorized to act as agents of the firm. The management was vested in seven directors chosen annually. The business of the firm was their transportation of passengers and freight on their road between Concord and Lebanon; and the directors were made the agents of the firm for the transaction of that business.<sup>4</sup> The majority of the firm having sold an estate of ninety-nine years in the property of which they and the objecting minority hold the equitable title, it is for the majority to justify the sale by showing their power to act for the minority. Of power passing directly from the minority to the majority, the defendants offer no oral evidence, and no written evidence but the charter. The partnership contract, written in the charter, makes no express mention of the majority; but when it provides that seven directors shall be chosen by ballot at the annual meeting of the stockholders, the meaning is that the choice shall be made by major vote.

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<sup>1</sup> Gen. Laws, ch. 149, § 150; *C. Bank v. Fiske*, 60 N. H. 363.

<sup>2</sup> *Farnum v. Patch*, 60 N. H. 294, 326; *Burke v. Concord Railroad*, 61 N. H. 160, 243.

<sup>3</sup> *Eastman v. Clark*, 53 N. H. 276; *Parchen v. Anderson*, 5 Montana, 438.

<sup>4</sup> Laws, 1844, ch. 190, §§ 2, 3, 4, 5, 8.

The directors "are authorized and empowered, by themselves or their agents, to exercise all the powers herein granted to the corporation, for the purpose of constructing and completing said railroad, and for the transportation of persons, goods, and merchandise thereon, and all such other powers and authority for the management of the affairs of the corporation, not heretofore granted, as may be necessary and proper to carry into effect the object of this grant."<sup>1</sup> The lease is no stronger than it would be if the power thus expressly given to the directors were expressly given to the majority of the stockholders. The power given by the contract to the directors is the authority of an agent to act for his principals within the scope of his employment; and this authority is the same whether expressly or impliedly given to a majority of the principals, or to seven or one of them. Its character and extent, and not the number of persons who can exercise it, is the material subject of inquiry. Whether the joint principals are called partners or not, the question of the validity of the lease is a question of agency. In the nature of things it is impossible for the majority of the stockholders to have any other authority to bind the minority by a contract than that of agents. The act of appointing the majority as agents of the minority is the act of the minority, and not the act of the State. It is not legislation. If it were, no appointment of any agent to do any business for any principal could be made by anybody but the State Legislature, or some other law-making assembly. If the stockholders are regarded as a single corporate body, the result is the same. The majority are not that body, but merely a part of it, and agents of the whole so far only as the whole has given them authority.

As agents, the majority can do whatever is necessary to carry on, for their principal, the principal's business of a common carrier between Concord and Lebanon. Within limits, they can select the mode and means of executing their agency. The lease, instead of being a mode or means of their carrying on that business for their principal, transfers it to another principal for ninety-nine years, and transfers their principal to the vocation of a landlord and rent-receiver, which is not, in kind or degree, the same business as carrying passengers and freight. The legal scope of their employment is within the bounds of their principal's business, or, at most, those bounds and a proceeding for winding up

<sup>1</sup> Union M. F. Ins. Co. v. Keyser, 32 N. H. 313, 315; Bissell v. M. R. Co., 22 N. Y. 258, 267.

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that business, and dissolving their principal. If this limit of their agency were not the measure of their power, every one who becomes a member of a partnership, incorporated or unincorporated, in a business specifically defined and limited by the partnership contract, would thereby authorize a majority of the company (with a legislative waiver of public objection) to carry off his investment into all other business within the range of human capacity; and every one who employs an agent in any business for any purpose, however restricted by the contract of employment, would thereby empower him to bind the principal by any contract the principal could make in any other business for any other purpose.

When A employs B and C as his general agents in the cultivation and management of his farm (No. 1), he gives them an implied power to do what is necessary for exercising the authority expressly granted. They cannot sell the farm.<sup>1</sup> Their sale of it, compelling their principal to abandon the work he employs them to do, would not be a performance of that work. Evidence that his agriculture is unprofitable, or that, for any reason, a change of the investment would be judicious, would not prove their power of sale. His discontinuance of his farming business is a question he does not submit to them for decision. They cannot sell and convey the farm for ninety-nine years, or for the shorter term of his natural life. Their general authority to carry it on for him, as his agents, is neither a power of excluding him, his heirs and assigns, forever from the business of a principal in carrying it on, nor a power of ousting three generations of owners. By making a lease, his agents would attempt to change his vocation from that of a farmer to that of a landlord. Employed by him in the cultivation of the soil, they would assume to embark him in a different business. A lease for ninety-nine years might be more embarrassing and disabling than a sale. With the cash proceeds of a sale, he could buy another farm which he might not be able to obtain in exchange for a right to collect rent. By a lease, his privilege of changing his investment might be seriously impaired. For many practical purposes, an unauthorized sale of his land for its value in money might be a less violation of his rights than an unauthorized lease for ninety-nine years. But the possible consequences need not be considered. The primary legal objection is sufficient. The express authority of B and C to carry on his farm for him does not

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<sup>1</sup> Story, Agency, § 71.



include an implied authority to deprive him of its control, possession and use. His appointment of them as his managing agents does not alienate his right to be the principal in the management, and does not confer the power of alienation on them, or on any branch of the government.

A sale or lease of the farm by B and C may not terminate its cultivation. They may become the agents of D, the purchaser or lessee, and carry it on for him. The same crops may be raised, the same stock kept, the same tools used, and the same work done. There may be no change in the character or extent of the business, and no other innovation than the substitution of D for A as the principal. But the validity of this exchange depends upon its being held that A's involuntary abandonment of his business is not, for him, a fundamental change of business, and that B and C can sell or let his farm, because a sale or lease will work no essential alteration in his legal and actual position as the principal in carrying it on. In an action brought by A against D to recover possession, the question of the agents' authority would be presented by a plea that the cultivation, continued by D, left A's calling substantially unchanged, and that A's agents carried on his farming business for him by transferring it from him to another principal. If the transfer were by a lease for ninety-nine years, the plea could also set forth the fact that a remainder is left in A which he can dispose of by a deed or will giving the grantee or devisee (his heirs and assigns) a right of possession and use at a remote period in the future. But A's dominion over his land, to-day, and during the remainder of his life, is a material part of his title. When the occupation is transferred to D by a valid lease, the lessee takes the land for the stipulated term, and for a use that is either public or private. The Legislature cannot authorize him to take it for a private use without A's consent. Against A's objection, D cannot be authorized to take it for a public use without a judicial ascertainment<sup>1</sup> and a prepayment of a sum of money equal to the value of what he takes. A conveyance of the land to him by B and C for a term of years at an annual, semi-annual, or quarterly rent, is not a provision for the prepayment of the judicially ascertained value of the whole term. On the question of the validity of the conveyance, it is not material whether the number of generations of evicted proprietors is three, or thirty, or one.

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<sup>1</sup> Cooley, Const. Lim. 563.

The complaint that D has taken the land is not answered by the plea that he intends to keep it only ninety-nine years. This plea would disclaim any temporary or provisional arrangement rendered inevitable or reasonably necessary by circumstances. And if the question were, not whether D has taken the land, but whether he intends to keep it an unconstitutional length of time, it would be as difficult to hold that A would not be deprived of his property by taking it from him for a term of ninety-nine years, as to hold that he would not be deprived of his liberty by imprisonment for the same term. So far as the legality of his deprivation is concerned, he might as well be ousted by a perpetual lease as by one which leaves him a remainder so distant that, in the ordinary course of nature, for the usual purposes of ownership, the farm that was his will never be his again.

When A, B and C are partners in the business of buying and carrying on another farm (No. 2), they are joint principals, and by fair implication, in the absence of express stipulation, each makes the others his agents for doing the joint business in the usual way, within the limits prescribed by the character of their enterprise. If B and C can bind A by an exchange of hay for a mowing-machine, and cannot bind him by an exchange of the farm for a saw-mill, it is because in the former case, by the exchange, the partnership business is carried on by B and C acting as principals for themselves and as agents for A, and in the latter case (aside from the law of real estate conveyance), the partnership business is not carried on, and therefore B and C are not exercising the power of agency given them by A. In their dual capacity, as principals, and as agents of A, they can do for the firm whatever is customary and necessary for the execution of the partnership contract, and the accomplishment of its object.<sup>1</sup> If buying farms and selling them, or letting them for ninety-nine years, had been the business of the firm and the object of their contract, the power of agency would have been very different from that given by the formation of a partnership for the ownership, cultivation and use of Farm No. 2.<sup>2</sup> As the general agency of B and C in carrying on Farm No. 1 for A as sole principal is not executed by their conveyance of the whole title, or a term of ninety-nine years, or a life estate, transferring A's business from him to another principal,

<sup>1</sup> *Story, Partnership*, §§ 101, 102, 111-114; *1 Lindley, Partnership*, 236; *Kimbro v. Bullitt*, 22 How. 256, 264-268.

<sup>2</sup> *Anderson v. Tompkins*, 1 Brock. 456, 460; *Chester v. Dickerson*, 54 N. Y. 1.

so their agency for A as one of the principals carrying on No. 2 is not executed by their making a similar conveyance that substitutes D for A as a principal in carrying on that farm. In each case, the expulsion of A from the position of principal by his agents would be the opposite of what he authorized them to do.

The law does not require B and C to remain in the firm beyond the time stipulated in their agreement. Any member of an ordinary partnership, the duration of which is indefinite, may dissolve it at any moment he pleases, and it will then be deemed to continue only so far as may be necessary for the purpose of winding up its affairs. Even if its duration is defined, circumstances may arise giving a partner a right to have it dissolved before the expiration of the time for which it was originally agreed to last. A cause of its dissolution may be furnished by the misconduct or insanity of one of its members, the hopeless state of its business, or any circumstance by which its continuance, or the attainment of its object, is rendered practically impossible.<sup>1</sup> For the purpose of paying debts, or avoiding bankruptcy, it may become necessary that the partnership business of A, B and C should be terminated, and their farm sold by them or a receiver; but a sale of it to D, or a lease of it to him for ninety-nine years, cannot be necessary for the purpose of enabling the firm to carry it on as owners and principals under their partnership agreement. They may not be able to go on under that agreement without mortgaging the farm: the mortgage may be foreclosed; and a mortgage made indefeasible by strict foreclosure is an absolute deed. But the possible necessity of a mortgage for prolonging their business<sup>2</sup> does not show that their power of carrying it on is exercised by an unnecessary deed or lease that instantly brings it to an end.

Their performance of their general contract for cultivation and management involves a frequent choice of methods. A great number of details, large and small, constantly await their determination. It is improbable that the partners will agree on all of them; and a requirement of unanimity might obstruct their operations, and even defeat the object for which the partnership was formed. There is, therefore, a reasonable inference of their intention that a minority, by mere dissent without dissolution, shall not control, impede or prevent the performance of their contract,

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<sup>1</sup> 1 Lindley, Partnership, 220, 222; 3 Kent, Com. 53-62; *Skinner v. Dayton*, 19 Johns. 513, 533.

<sup>2</sup> *Pierce v. Emery*, 32 N. H. 484, 504.



and that it may be performed according to the will of the majority. The power of a majority, whether expressed or inferred, is the power of an agent to act for his principal, and of a principal to act for himself. A, B and C are the firm, and agents of the firm. This is one form of the proposition that they are principals, and agents of each other. What shall they plant? What produce shall they sell? When shall they sell or buy anything, and at what price? What blacksmith shall they employ? Of what material shall they build a fence? If, between A and his copartners, he is bound by their decision of such questions, notwithstanding his dissent, it is because the questions decided are within the partnership jurisdiction, and his agreement that the farm shall be carried on by the firm for the firm makes his partners his agents, and authorizes a majority to control in the cultivation and management required by their contract. The implied agency of a majority to carry on that business for A, B and C as principals, like the implied agency of one of them, is not exercised by a transfer of the whole business to D as lessee and sole principal for ninety-nine years.

The partners engaging in the business of carrying on Farm No. 2 can rescind or modify their contract. They can abandon that business, lease the farm to D for ninety-nine years, and become mere landlords, receiving rent from the tenant who takes the place of principal in the business from which they withdraw. But the partnership agreement, made by three, cannot be altered by one or two. It is an agreement made by each one, on one side, with the other two, on the other side. Each is bound by his own contracting power, exercised by himself originally, or by himself or his agents afterwards. The agency of B and C to act for A in the execution of the partnership contract is not a power to alter A's agreement, or to make an alteration in the partnership business that would be a violation of the contract. The business need not always be continued precisely as it is begun. Improvements required for its successful prosecution are ways and means supposed to be contemplated. But the contract to be performed until it is annulled or changed, is an agreement that the farm shall be carried on, not by anybody for anybody, but by the firm, and for the firm, as principals. So long as that is the contract, the question of law raised by a lease to D for ninety-nine years against A's protest, is, not whether the transfer of the whole business from the firm to a different principal is judicious, nor whether a majority's

violation of a minority's right is a custom and a public policy, but whether the transfer is a performance of the contract, or a violation of it. While all can unmake or alter the agreement which all make to carry on the business as principals, all cannot perform it by putting D as principal in their stead for ninety-nine years; and a change that is not performance when made by all, is not performance when made by a majority.

If the partners accept an act of incorporation containing the substance of their partnership articles, and convey their partnership property, from themselves unincorporated, to themselves incorporated, the authority of B and C over A's share of the farm is not increased, and their case is not altered in any particular that affects the validity of a lease for ninety-nine years made by a majority against the objection of a minority. As owners of farm-shares, B and C have a right of sale as a part of a process of corporate dissolution (whether with or without judicial proceedings we need not now inquire). This right of sale is not given them by their agency in carrying on A's farm (No. 1). Their corporate power to bind A by a lease of Farm No. 2 for ninety-nine years, like their authority to bind him by a lease of No. 1, is a question of agency.

In 1804, thirty-one persons, including the two plaintiffs, became partners in the publication of the "British Press" and "Globe" newspapers, and agreed that the business should be managed by a committee, chosen quarterly, and that the resolutions of the majority of the partners present at all general meetings should be binding on all. In 1807, the partnership "having been for some time a losing concern," the whole property was sold in pursuance of a resolution passed at a general meeting. The plaintiffs dissented. All, "except the plaintiffs, acceded to the sale, and received their shares of the purchase-money." It was held that the majority could not sell the whole property; and the decree of the Master of the Rolls against the purchasers for an account of the profits made and the losses incurred after the sale, was affirmed, on appeal, by Eldon.<sup>1</sup> The agreement that a committee should manage the business was held, not to mean that the committee could transfer it to another principal by a sale. The agreement that the resolutions of the majority should be binding on all was held

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<sup>1</sup> Chapple v. Cadell, Jacob, 537. Compare the opinion of the same Judge in the leading case of *Natusch v. Irving, Gow on Partnership*, App. 398, ed. 3. See also *Const. v. Harris, Turn. & R.* 496; 2 *Lindley, Partnership*, 600-604.

to mean resolutions as to the transaction, and not a transfer, of the business. If the agreement had been to engage in the purchase and sale of newspaper establishments, the sale of the "Press" and "Globe" by the majority would have been valid without the express stipulation as to the power of the majority. The sale that would have been an act in execution of a contract to carry on the business of buying and selling newspaper establishments, was held not to be performance of the contract to carry on the business of publishing the "Press" and "Globe." When the firm had published those papers for some time at a loss, and nearly all voted for a sale, it is not improbable that the condition of the business was such that, on a bill in equity, the law would have dissolved the firm, and would have wound up its affairs by selling its property, paying its debts, and dividing the residue of assets among the partners; and if the work of winding up would be as well and as safely done by the majority as by the law, there may be a question whether equity would interpose an injunction. But if the contract to carry on the partnership business of publishing the "Press" and "Globe" included an implied stipulation that the firm might be wound up by a majority, there was no inference of an agreement that a majority might make a lease of all the partnership property for ninety-nine years. By such a lease, the firm would neither carry on its business nor wind itself up. It is said that if partners intend the majority shall have power to wind up or sell the whole concern, the authority must be expressly given; for it cannot be inferred from the general language of a provision authorizing the majority to direct and regulate the concerns of the partnership.<sup>1</sup> "Although general powers of management necessarily include power to sell in the ordinary course of business, such powers do not authorize sales of an unusual description, *e. g.*, a sale of the business of the company."<sup>2</sup> If a sale of the whole business, by a majority, for the purpose of winding up, is an exception to this rule, the exception does not include a lease by which the firm is neither wound up, nor allowed, for ninety-nine years, to do the work it agreed to do.<sup>3</sup>

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<sup>1</sup> Story, Partnership, § 213; Collyer, Partnership, § 223.

<sup>2</sup> 1 Lindley, Partnership, 295.

<sup>3</sup> See also *Colman v. E. C. R. Co.*, 10 Beav. 1, 14, 15; *Simpson v. Westminster Palace Hotel Co.*, 8 H. L. Ca. 712, 717, 718, 719; *Featherstonhaugh v. Lee Moor, P. C. Co.*, L. R. 1 Eq. Cases, 318; *Ashbury, & Co. v. Riche*, L. R. 7 H. L. 653, 664, 665, 667, 668, 669, 671, 684, 687, 693; *Thomas v. R. R. Co.*, 101 U. S. 71, 81; *Hutton v. S. C.*



By a contract signed by about fifty persons, in 1839, the subscribers agreed to become partners in a firm to be styled the "Farmers' and Mechanics' Store," and to pay the sums annexed to their respective names, as the capital to be used by the firm in carrying on a retail trade in domestic and foreign goods at Bath. The twelfth article of the contract provided that there should be "neither purchase nor sale of ardent spirits by the concern." The business forbidden by this article was allowed by an amendment to which two of the subscribers (the plaintiffs in the reported case) did not assent; and it was held that they were not bound by the altered articles of partnership.<sup>1</sup> The plaintiffs did not pay the sums set against their names, and were discharged from liability by their rescission of the contract which the other parties had violated. If the violation had occurred after the plaintiffs contributed their shares of the capital, when mere rescission would not be a sufficient relief, they would have been entitled to an injunction against the purchase of spirituous liquor, or a dissolution of the firm and a division of its property, or some other complete redress. They could not be compelled either to be partners in the business prohibited by their contract or to sell their shares, but would have an adequate remedy in an appropriate suit. If the majority were dissatisfied with the twelfth article, they could sell their shares; but they could not put the plaintiffs to the alternative of submitting to the wrongful change of business, or withdrawing from the firm. Violations of the contract by the majority, before and after the plaintiffs paid their shares, would present different questions of procedure. But a material and unauthorized change of the business after they invested their money in it, would be no less a violation of their legal right than a prior change; and their legal remedy would be no less effectual in one case than in the other.

The decision that the change of business was material and substantial, and that no dissenting partner was bound by the alteration of the twelfth article, was an ascertainment and adjudication of the original intention of the parties. If the twelfth article had required ardent spirits to be kept for sale under the license law then in force,<sup>2</sup>

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Hotel Co., 2 Drewry & Smale, 521, 524, 525, affirmed on appeal, 11 Jurist (N. S.) 551; Pickering v. Stephenson, L. R. 14 Eq. 322, 340; Ward v. G. J. Water Works, 2 R. & M. 470; Davis v. Old Colony R. R. Co., 131 Mass. 258, 259; Day v. S. S. B. Co., 57 Mich. 146, 150; Lucas v. W. L. T. Co., 70 Iowa, 541, 545, 546, 549, 550.

<sup>1</sup> Abbott v. Johnson, 32 N. H. 9, 19, 20.

<sup>2</sup> Pierce v. State, 13 N. H. 536, 538.

the contract would have been materially altered by a prohibitory amendment made by a majority of the firm; and a partner not assenting to such an amendment would not be bound by it. It might cut off the only branch of their trade in which he took any interest. His object might be a share of profit; and he might be of opinion that, at that time and place, without ardent spirits, there would be no profit. If the change were made before he paid his share of the capital, he could rescind his contract: if it were made after payment, he would have ample remedy by process of law adapted to the situation. Such an alteration of the twelfth article, or any other part of the agreement, as would not change its meaning, or affect any right or obligation of any contracting party, would be immaterial.<sup>1</sup> Authorizing a large majority or a small minority to conform the business to a material alteration made by them in the contract, is not legislation; and on the question of the validity of the alteration, it is not material whether the partnership is incorporated or not; in either case the contract of fifty partners binds forty-nine of them as firmly as it binds one; and the contract of the fifty, that could be made only by the non-legislative power of all the contracting parties, can be materially altered only by the non-legislative power of all who are parties at the time of alteration. "The majority of the Farmers' and Mechanics' Store may alter the twelfth article of the partnership contract by accepting and exercising the power hereby given to that unincorporated company to sell ardent spirits; and the majority of the Northern Railroad may alter the partnership contract by accepting and exercising the power hereby given to that incorporated company to lease their road for ninety-nine years." A statute in that form would not decide the judicial question of the materiality of the alteration of contract and business, but would present the question whether the twelfth article is performed by selling ardent spirits, and whether the partnership agreement of all the Northern company to carry on the business of transporting passengers and freight on their road is performed by a performance of the majority's subsequent agreement not to carry on that business from 1884 to 1983.

The immateriality of the mere incorporation of the partners, on the question of the power of the majority in this case, is settled in

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<sup>1</sup> *Smith v. Crooker*, 5 Mass. 538, 540; *Martendale v. Follet*, 1 N. H. 95-97; *P. Bridge v. Mathes*, 8 N. H. 139, 141; *Burnham v. Ayer*, 35 N. H. 351, 354; *Cole v. Hills*, 44 N. H. 227, 232.

the case of a river-improvement company, decided by this court in 1817. *Union Locks & Canal v. Towne*,<sup>1</sup> was a suit brought to recover assessments made by the plaintiffs on a share of their capital for which the defendant had subscribed. The plaintiff's charter, passed in 1808, authorized them to render Merrimack River navigable from Amoskeag Falls southward to Reed's Ferry, a distance of about eight miles, and for effecting this object to buy six acres of land, and to collect, for forty years, a toll not averaging over twelve per cent on the capital invested.<sup>2</sup> In 1809 an additional Act, passed on the plaintiffs' petition, repealed the limitations of the amount and duration of toll, and authorized them to buy one hundred acres of land instead of six. In 1812 another Act granted to one Sullivan the right of locking Cromwell's Falls, which were about six miles south of Reed's Ferry, authorized him to transfer his rights in this grant to the plaintiffs, and provided that "whenever such transfer shall be made, . . . this Act shall be considered as an addition to the aforesaid Act incorporating the proprietors of Union Locks and Canal." The transfer was made and accepted in 1813. The defendant did not assent to either of the changes of the company's powers; and it was held that the enlargements accepted by the majority of his associates were material alterations of the original enterprise and of the contract made by the company with its members, and that he could not be compelled to pay for the share for which he had subscribed.

The grounds of that decision are fully reported. The terms of the defendant's contract are limited by the charter. To make a valid change in this private contract, as in any other, the assent of both parties is indispensable. The corporation on one part can assent by a vote of the majority; the defendant on the other part by his own personal act. The defendant, having never assented to either of the additional Acts, is under no obligations to the plaintiffs except what he incurred by becoming a member under the first Act. Assessments made to advance objects essentially different, or the same objects in methods essentially different, from those originally contemplated, are not made in conformity to the defendant's contract with the corporation; and the action, sustainable on that contract alone, cannot be supported. Assuming his membership, and regarding him as having made a purchase of a share under the Act of 1808, the obligations imposed on him by that purchase

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<sup>1</sup> 1 N. H. 44.

<sup>2</sup> See 9 Granite Monthly, 5, 6.



were to pay assessments made for the objects, and under the restrictions, contained in that Act, and not to pay assessments made for other and more extended objects, or under different and fewer restrictions. Notwithstanding the laudable object and great utility of the additional Acts, if they effected a material change, he is able to say *non hæc in fœdera veni*. The company's acceptance of the Act of 1812 for locking Cromwell's Falls effected a material change in the original corporation. It was, in fact, uniting two distinct corporations. After that acceptance the money assessed would be raised not only for the purpose first contemplated, of making the Merrimack navigable eight miles, from Amoskeag Falls down to Reed's Ferry, but also for the purpose of making it navigable at Cromwell's Falls, — a place six miles below Reed's Ferry, and wholly without the boundaries included in the first Act. Neither the letter nor the spirit of the defendant's contract could extend to an object which was not originally within the contemplation and power of the parties. The amendment of 1809 does not vary the bounds of the river-improvements, but it grants a material increase of corporate power. The additional Acts are a variation from the contract originally made, and a variation, too, which reaches the essence of the contract. The defendant's assent to amendments extending the objects, or increasing the powers of the corporation, is not to be presumed, but must be expressly shown.

On these grounds it was held that he was not engaged in the new enterprise of locking Cromwell's Falls, or the new enterprise of buying one hundred acres of land instead of six, and collecting a toll unlimited in amount and duration instead of one not exceeding twelve per cent for forty years. He was not bound by the votes of the majority enlarging the power he had given them over his share of the corporate property. The amendments of the charter were a waiver of the public objection to an enlarged area of corporate power; but as he was bound by nothing but his own contract as to the authority of the majority to act for him as his agents within the original area, so he could be bound by nothing but his own contract for an extension of that authority. The decision and the reasons on which it was based are affirmed in *March v. Eastern R. Co.*<sup>1</sup> The doctrine of agency, thus applied, has been maintained in this State seventy years, and there is no legal or equitable principle on which it can be overturned.

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<sup>1</sup> 43 N. H. 515, 525, 526, 532, 533.

If the defendant in *Union Locks & Canal v. Towne* had paid his share of the capital before the passage of the Act of 1809, his rights would have required some other remedy than a defence in that suit.<sup>1</sup> His agents could gain no legal advantage over him by postponing the enlargements till he paid his share. In the absence of other adequate remedy, his rights could be maintained by writ of *mandamus*, or other process from the common-law jurisdiction that superintends all civil corporations.<sup>2</sup>

If the works of the Union Locks & Canal had been constructed within the bounds of the charter, and the fact had then been found that the investment would be wholly lost unless they opened communication with the Middlesex Canal by locking Cromwell's Falls, or that the extension was necessary to accomplish the purposes of Towne's contract, the question might have arisen whether, on that point and to that extent, the case came within the implied power of doing what was necessary for carrying those purposes into effect.

Neither in that case nor in this was a legislative reservation of a power of altering and repealing the original legislative grant necessary to enable the Senate and House to make an additional grant of corporate power which the grantees could accept or refuse to accept. The meaning of such a reservation in a charter is an undisputed historic fact. Its only purpose and effect in the charter of the Northern Railroad is to enable the legislative grantors to revoke, wholly or partially, conditionally or unconditionally, their grant of legal rights to that company; that is, to alter the grant in some other way than giving them more rights which they can accept or reject. The reservation enables the Legislature to exercise the legislative power of revocation without the consent of the stockholders, and against their unanimous opposition. All legislative power except that of revocation can be exercised without the reservation. By New Hampshire law the charter being, on the part of the State, a repealable statute, and not a contract, the reservation is not necessary for any purpose.<sup>3</sup> By federal law, as construed by the federal court, it is necessary for the purpose of retaining the power of total and partial repeal. So

<sup>1</sup> *March v. Eastern R. Co.*, 43 N. H. 515; *Cook, Stockholders*, § 502.

<sup>2</sup> 3 Bl. Com. 42; 1 Bl. Com. 470, 471; High, Extr. Remedies, ch. 4; *Boody v. Watson*, 64 N. H. 162, 170, 171, 172, 173; *B. C. & M. Railroad v. State*, 32 N. H. 215, 230, 231.

<sup>3</sup> See 6 HARVARD LAW REVIEW, pp. 213-216. — EDITORS.

far as federal construction makes the charter a contract of the State, as well as a law, it would, if unqualified, introduce the evil of an irrevocable legislative Act. By the reservation, the Senate and House continued to hold that rescinding portion of their power which, in the opinion of the federal court, they would have lost if they had not expressly retained it. By the Act of incorporation, qualified by the reservation, they lost no power and gained none. With the reservation, for all the purposes of this case, they have the whole of the supreme legislative power vested in them by the second article of the Constitution; and they can exercise the whole of it as well without a vote of the stockholders, or against their unanimous objection, as with their unanimous assent. And if all contractual power were legislative, it would follow, not only that the Senate and House can make any agreement between those stockholders as to what business they will undertake, but also that the members of a legislative body, acting in their official capacity, are the only persons legally competent, in this State, to make that or any other contract.

The grant of leasing power to the Northern Company, like the grant of other powers in the charter, being ineffective until accepted by the grantees, is not an alteration of the partnership contract. As the grantees made every granted power a part of that contract when they accepted the charter and thereby made it the evidence of their agreement, so they alter the contract by inserting in it every other power which they afterwards accept. The grant of leasing power is an enabling Act. It legalizes their alteration of their contract, and their exercise of the new power when their acceptance of it has made it theirs. On the question whether it has been granted and accepted, it is immaterial whether, when accepted, it is to be exercised by two-thirds, or a majority, or one of the partners.

*(To be continued.)*



## CONSENT IN THE CRIMINAL LAW.

THIS subject divides itself naturally into two parts: First, what is consent? Second, what is the effect of consent?

### I.

It is not always clear at first sight what act is consented to, or how far a knowledge of all the circumstances is necessary for an effectual consent. A hands B a gold coin, thinking it a silver one: has he consented to part with the gold coin? Or, seeing what he takes to be a pasteboard box upon the sidewalk, he kicks it, and finds it a brick: is the consequent pain in his foot inflicted with his consent? The answer to these questions is not to be found (as jurists have too often tried to find it) upon the surface of a single case; a comparison of many authorities is necessary for a satisfactory solution. It will not do to depend, as is often done, on the maxim, "Fraud vitiates consent." Fraud, it is true, does often vitiate consent, but this is a statement as to the effect of consent, not as to its existence; fraud does not negative consent. Consent exists, however acquired; and if we say there is a consent that fraud vitiates, we have solved the present question.

The first difficulty to be met may best be suggested by a comparison of two cases. In the first, a young man gave a girl a fig into which he had put a poisonous powder; the girl ate the fig, and was injured by the powder.<sup>1</sup> In the second, one who asked the loan of a shilling was by mistake handed a sovereign, which he took in ignorance of the mistake.<sup>2</sup> What consent, if any, was given in the two cases?

Now, it seems to me quite clear that in the former case the girl consented to take one thing, — a fig, — and did take two things, — fig and poison. The consent, then, did not cover the poison; she was given that in addition to what she consented to receive. As the case stood, poison had been administered to her without her consent. In the second case, it seems that there was consent to give and to take a coin. The parties surely consented to pass something, and the coin was the only thing in question. In the same way, if, instead of a fig, in the former case the girl had

<sup>1</sup> *Com. v. Stratton*, 114 Mass. 303; reprinted in my *Cases on Criminal Law*, 451.

<sup>2</sup> *Reg. v. Ashwell*, 16 Cox, C. C. 1; 16 Q. B. D. 190; *Cas. Crim. Law*, 566.

received a piece of poisonous substance in the shape of a fig, supposing it to be a fig, she would have consented to receive that substance.<sup>1</sup> In these cases consent exists, though given under a misapprehension. Cases may be imagined near the line exceedingly hard to decide. Suppose in the course of a ball-game one player throws to another a ball to which is attached a dynamite cartridge, there is clearly no consent to catch the cartridge, whether it is attached outside or inside the cover. On the other hand, if such a cartridge alone is thrown, and one sees and voluntarily catches it, there is consent to receive it, in spite of the mistake. But if the whole interior of a ball is taken out, and the cover filled with dynamite, a jury may have a difficult question to solve. For if there is but one thing, — a ball of dynamite, — there is consent to receive it, the party having consented, as is agreed, to catch something. If there are two things, — a ball *plus* dynamite, — there is no consent to receive the dynamite. This is the sort of question which a jury is much better fitted than a court to answer; for, in the nature of things, the decision in one set of circumstances ought not and cannot prejudice the decision of a similar question later. The only general statement to be made is that if more things were done than were consented to, the additional things were done without consent, — which seems true enough mathematically, but a lame and impotent conclusion for so labored an argument. The triteness of the conclusion is admitted; the ne-

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<sup>1</sup> The judges who favored conviction in *Reg. v. Ashwell* were much confused on this point. Thus, Cave, J., said: "In order that there may be a consent, a man must be under no mistake as to that to which he consents; and I think, therefore, that Ashwell did not consent to the possession of the sovereign until he knew that it was a sovereign." Lord Coleridge said: "There was no delivery of the sovereign to the prisoner by Keogh, because there was no intention to deliver, and no knowledge that it had been delivered. . . . In good sense, it seems to me that he did not take it till he knew what he had got. . . . I can see no sensible or intelligible distinction between the delivery of a bureau not known to contain a sum of money, or a purse, and the delivery of a piece of metal not known to contain in it 20s." The true view was expressed by Cox, Serjeant, in *Reg. v. Jacobs*, 12 Cox, C. C. 151 (a case utterly overlooked in Ashwell's case): "He intended to give the prisoner the particular piece of coin he held between his fingers, although he was mistaken as to the nature of that coin. At the instant of its passing from the fingers of the prosecutor to the hand of the prisoner, he intended to give, and the other intended to receive, the coin so held." As Smith, J., said, in *Reg. v. Ashwell*, the prosecutor "intended to deliver the coin to the prisoner, and the prisoner to receive it. The chattel, namely, the coin, was delivered over to the prisoner by its owner, and the prisoner received it honestly. He always knew he had the coin in his possession after it had been delivered to him. The only thing which was subsequently found was that the coin delivered was worth 240d. instead of 12d., as had been supposed."

cessity of the argument, in view of the authorities, though lamentable, is patent.

Many applications of this doctrine are suggested by the cases. For instance, consent to give and take a desk does not include consent to give and take money, or anything else concealed in the desk, and possession of a thing so concealed does not pass with the desk;<sup>1</sup> though consent to give and take a desk, and whatever it contained, would cover all the contents, whatever they might be. So where a sealed envelope is given, there is consent to take its ordinary contents,<sup>2</sup> since an envelope implies an enclosure; but if it contained not only a letter, but also a bit of gold that had accidentally fallen in, there would be no consent to take the gold. So where one was driving a herd of cattle, and a strange beast joined the herd without being noticed by the drover, there was no consent to take the beast; but if the drover noticed the beast near the herd, and drove it among the others, thinking it one of the herd, he consented to take it, though the consent was induced by a misapprehension, and thereafter he was in possession of the beast.<sup>3</sup> The same considerations should cover the case where a diseased man has connection with his wife. The marital consent covers the connection, but not contact with the virus, a foreign substance conveyed to the wife without her consent, like the poison in the figs.<sup>4</sup>

<sup>1</sup> *Merry v. Green*, 7 M. & W. 623; *Cas. Crim. Law*, 548; *Robinson v. State*, 11 Tex. App. 403.

<sup>2</sup> *Reg. v. Flowers*, 16 Cox, C. C. 33; *Cas. Crim. Law*, 574. And see *Rex v. Mucklow*, 1 Moody, 160; *Cas. Crim. Law*, 547.

<sup>3</sup> See *Reg. v. Finlayson*, 3 New South Wales Sup. Ct. 301; *Cas. Crim. Law*, 565; *Reg. v. Riley*, 6 Cox, C. C. 88; *Cas. Crim. Law*, 591.

<sup>4</sup> This point was much debated in the case of *Reg. v. Clarence*, 16 Cox, C. C. 511; 22 Q. B. D. 23; *Cas. Crim. Law*, 438; and finally decided adversely to the position I have taken. Wills, J., for the majority of the court, said, in the course of his opinion: "That consent obtained by fraud is no consent at all is not true as a general proposition, either in fact or in law. If a man meets a woman in the street, and knowingly gives her bad money in order to procure her consent to intercourse with him, he obtains her consent by fraud; but it would be childish to say that she did not consent. . . . To separate the act into two portions, as was suggested in one of the Irish cases [*Hegarty v. Shine*, L. R. 4 Ir. 288?], and to say that there was consent to so much of it as did not consist in the administration of an animal poison, seems to me a subtlety of an extreme kind. There is, under the circumstances, just as much and just as little consent to one part of the transaction as to the rest of it. No one can doubt that in this case, had the truth been known, there would have been no consent, or even a distant approach to it. I greatly prefer the reasoning of those who say that because the consent was not to the act done, the thing done is an assault. If an assault, a rape also, as it appears to me." What seems to me a far sounder argument is well put by



The question whether fraud can negative consent has been much discussed in rape cases. Where connection is secured by personating the husband, it is almost everywhere held, properly, that consent exists in fact, and that there is therefore no rape.<sup>1</sup> The same thing is held where connection is obtained by some other fraud, yet is consented to,<sup>2</sup> or by taking advantage of a woman of weak mind, who consents because of her mental weakness;<sup>3</sup> consent, however obtained, is inconsistent with the commission of

Hawkins, J., in his dissenting opinion: "In my judgment, wilfully to place his diseased person in contact with hers, without her express consent, amounts to an assault. It has been argued that to hold this would be to hold that a man who, suffering from gonorrhœa, has communion with his wife might be guilty of the crime of rape. I do not think this would be so. Rape consists in a man having sexual intercourse with a woman without her consent; and the marital privilege being equivalent to consent given once for all at the time of marriage, it follows that the mere act of sexual communion is lawful. But there is a wide difference between a simple act of communion which is lawful, and an act of communion combined with infectious contagion, endangering health and causing harm, which is unlawful. It may be said that, assuming a man to be diseased, still, as he cannot have communion with his wife without contact, the communication of the disease is the result of a lawful act, and therefore cannot be criminal. My reply to this argument is that if a person, having a privilege of which he may avail himself or not, at his will and pleasure, cannot exercise it without at the same time doing something not included in this privilege, and which is unlawful and dangerous to another, he must either forego his privilege, or take the consequences of his unlawful conduct. I may further illustrate my view upon this part of the case by applying, by way of test, to an indictment for assault the old form of civil pleadings. Thus: Indictment for an assault; plea of justification, that the alleged assault was the having sexual communion with the prosecutrix, she being the prisoner's wife; new assignment, that the assault charged was not that charged in the plea, but the unlawful and malicious contact of her person with dangerous and contagious disease. What possible justification could be pleaded or answer given to such new assignment?"

<sup>1</sup> *Reg. v. Barrow*, L. R. 1 C. C. 156; *Cas. Crim. Law*, 455; *Wyatt v. State*, 2 Swan, 394; *contra*, *Reg. v. Dee*, 15 Cox, C. C. 579, on the ground, as stated by Pales, C. B., that consent must "proceed from the will, not when such will is acting without the control of reason, as in idiocy or drunkenness, but from the will sufficiently enlightened by the intellect to make such consent the act of a reasoning being. . . . Excluding cases in which an outward action apparently, but not in fact, accompanied by mind is acted upon by another, any act done by one under the *bona fide* belief that it is another act *different in its essence* is not in law his act; and that is the present case. The person by whom the act was to be performed was part of its essence. The consent of the intellect, the only consent known to the law, was to the act of the husband only." It seems sufficiently obvious that no act of the husband was in question, and that if there was consent to anything, it was to the act offered and done by the defendant. The error arises from a confusion between consent to an act and consent to a crime. The woman does not, it is true, consent to a crime; but she does consent to the act, and as a result there is no crime.

<sup>2</sup> *Don Moran v. People*, 25 Mich. 356.

<sup>3</sup> *Reg. v. Fletcher*, 10 Cox, C. C. 248.

rape.<sup>1</sup> It is, however, always held in such a case that the defendant is guilty of assault and battery;<sup>2</sup> and in at least one well-considered case this is put upon the ground that fraud negatives consent.<sup>3</sup> The true explanation of these cases is without doubt one to be discussed later, in considering the effect of consent.

A similar question arose under an English statute which made it criminal for the master of a workhouse to dispose of the bodies of deceased inmates for dissection, if relatives required them to be buried. A master of a workhouse by falsely pretending to bury the body of a deceased inmate induced the relatives to refrain from formally requiring burial; and he then sold the body for dissection. It was held that he could not be punished under the statute. Pollock, C. B., truly said that though defendant acted a lie to prevent the requirement from being made, that was not the offence with which he was charged.<sup>4</sup>

A seeming consent extorted by force or terror differs from consent obtained by fraud. In the latter case the mind is deceived into agreement; in the former, the body is forced to act without a real agreement of the mind. Force or terror, then, may negative consent;<sup>5</sup> and, similarly, where one is forced to do a criminal act, he may show the coercion as a defence.<sup>6</sup> This is, however, confined to cases where the force threatened is immediate,<sup>7</sup> and is to the person, or at least to property in the personal possession of

<sup>1</sup> Cases where consent is lacking must be distinguished. So where one has connection with a woman insensible from intoxication (*Reg. v. Champlin*, 1 Den. C. C. 89; *Com. v. Burke*, 105 Mass. 376), or asleep (*Reg. v. Mayers*, 12 Cox, C. C. 311), or submitting because of idiocy or ignorance (*Reg. v. Fletcher*, 8 Cox, C. C. 131; *Pomeroy v. State*, 94 Ind. 96), the act is done without her consent, and is therefore rape. The distinction is well pointed out in *Reg. v. Barratt*, 12 Cox, C. C. 498; L. R. 2 C. C. 81.

<sup>2</sup> *Reg. v. Saunders*, 8 C. & P. 265 (personation); *Rex v. Nichols*, Russ. & Ry. 130; *Reg. v. Lock*, L. R. 2 C. C. 10 (advantage of ignorance); *Reg. v. Bennett*, 4 F. & F. 1105 (disease).

<sup>3</sup> *Reg. v. Case*, 4 Cox, C. C. 220; *Cas. Crim. Law*, 435. "What she consented to was something wholly different from that which was done, and therefore that which was done was done without her consent;" *per* Wilde, C. J. Alderson, B., said: "When a man obtains possession of the person of a woman by fraud, it is against her will;" and Platt, B., added, "The girl consents to one thing, and the defendant does another." See also *Rex v. Rosinski*, 1 Moody, 19.

<sup>4</sup> *Reg. v. Feist*, D. & B. 570, 3 Laws Cr. Def. 336.

<sup>5</sup> *Reg. v. Bunce*, 1 F. & F. 523; *Cas. Crim. Law*, 651; *Reg. v. Woodhurst*, 12 Cox, C. C. 443; *Reg. v. Blackham*, 2 East, P. C. 711; *Cas. Crim. Law*, 202; *Taplin's Case*, 2 East, P. C. 712. As where one is forced to sell property by threats or violence if he refuses. *Rex v. Simons*, 2 East, P. C. 712; *Spencer's Case*, *ibid.*

<sup>6</sup> *Rex v. Crutchley*, 5 C. & P. 133; *Cas. Crim. Law*, 367.

<sup>7</sup> *Resp. v. McCarty*, 2 Dall. 86; *Cas. Crim. Law*, 364.



the owner; as, for instance, in case of a threat to tear or burn down the house in which a man lives.<sup>1</sup>

It is often important to notice just the extent and the nature of the consent given. Consent that one may take a thing in his hand is not necessarily consent that he may take possession of it. Thus, to use the classical illustration, where plate is put before a guest at an inn, there is no consent that he may take possession of it; and if he does so, it is an act of trespass.<sup>2</sup> In the same way it is to be observed that mere acquiescence in the act of a thief by the owner of goods taken, for the purpose of detecting the crime, is not consent that the goods shall be taken. It is at most a consent to afford a chance for a tortious taking.<sup>3</sup> If, however, the owner takes any step to induce the act, it is impossible to say that the act is not done with his consent.<sup>4</sup>

It is to be borne in mind that a conditional consent that something may be done can be given in advance. If, then, the condition is fulfilled, the consent is valid; if, however, the condition is not exactly carried out, it cannot be relied upon. Thus, where a box is placed in a public place containing a printed notice that any one who drops a nickel in the slot shall have a cigar, the consent that a cigar may be taken is conditional upon dropping the nickel, and if the cigar is taken without this being done, it is an act of trespass.<sup>5</sup> This principle may sometimes be relied upon to nega-

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<sup>1</sup> *Rex v. Astley*, 2 East, P. C. 729. This rule was relaxed in England for a while, in case of a threat to accuse one of sodomitical practices; money extorted by such a threat was held to be parted with against the consent of the owner, the threatened injury to the character taking the place of force to the person. This departure from principle was no doubt due to the extraordinary apprehension with which this disgusting crime was then regarded in England (it was called "the greatest of all crimes" by Ashhurst, J., in *Hickman's case*); and it did not extend to similar threats not connected with this particular crime (*Rex v. Knewland*, 2 Leach, 721). Those who care to pursue the unprofitable subject will find material for the study in *Rex v. Donolly*, 2 East, P. C. 715; 1 Leach, 193; *Rex v. Hickman*, 1 Leach, 278; *Rex v. Jackson*, 1 East, P. C. Add.; *Reane's Case*, 2 East, P. C. 734; *Egerton's Case*, Russ. & Ry. 375; *Fuller's Case*, Russ. & Ry. 408.

<sup>2</sup> Compare such cases as *Rex v. Chissers*, T. Raym. 275; *Cas. Crim. Law*, 515; *Reg. v. Slowly*, 12 Cox, C. C. 269; *Cas. Crim. Law*, 516; *Com. v. O'Malley*, 97 Mass. 584; *Cas. Crim. Law*, 518; *Com. v. Lannan*, 153 Mass. 287; *Cas. Crim. Law*, 521.

<sup>3</sup> *Norden's Case*, cited in *McDaniel's Case*, *Fost. C. L.* 121; *Cas. Crim. Law*, 152; *Eggington's Case*, 2 East, P. C. 666; *Cas. Crim. Law*, 154; *State v. Anone*, 2 N. & Mel. 27; *State v. Hayes*, 105 Mo. 76.

<sup>4</sup> *McDaniel's Case*, *supra*.

<sup>5</sup> *Reg. v. Hands*, 16 Cox, C. C. 188; *Cas. Crim. Law*, 614. So where a box of matches is placed on a counter for the use of customers (*Mitchum v. State*, 45 Ala. 29; *Cas. Crim. Law*, 616). I have already suggested this as a possible explanation of the



tive consent in cases of indecent assault, similar to those already considered.<sup>1</sup> It is also involved wherever a game is played that involves a hand-to-hand struggle. In a foot-ball game, for instance, each player consents in advance to such injuries as he may suffer, so long as they are inflicted by one acting within the rules of the game; but an injury caused by unfair play is not consented to.<sup>2</sup>

## II.

The existence of consent is a question of fact; the effect of it purely a question of law. To the consideration of that question we now proceed.

The injury redressed by every prosecution is an injury to the public. The consent of an individual that an act criminal in its nature should be done is therefore no defence to a prosecution. An act which consists of an injury to an individual may, however, be a criminal act only if done without the consent of the individual. Of this nature are larceny, which consists in a taking against the will of the owner; rape, which is a connection with a woman without her consent; and simple assault, which cannot be committed upon one who consents, since it involves fear or a menace of fear. The effect of consent in such cases, however obtained, must be to put an end to any question of crime. Thus, as we have seen, connection with a woman where her consent is obtained by fraud cannot be rape; and an unsuccessful attempt to have connection with a girl below the age of consent cannot be a simple assault, if she in fact consents.<sup>3</sup> The same thing must be true in larceny; a taking with the consent of the owner, however obtained, is not a taking *invito domino*, and is therefore no larceny. As we have seen, where the owner of goods really brings it about that they are larcenously taken, in order that he may detect the thief, there is no larceny, for the taking is with the owner's consent. So where the owner of stolen goods recovers them, but allows the

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well-known Carrier's Case (6 HARVARD LAW REVIEW, 250). See Mr. Justice Stephen's comments on the latter case in *Reg. v. Ashwell*, *supra*.

<sup>1</sup> See the language of Platt, B., in *Reg. v. Case*, *supra*. This same principle was relied upon to support conviction, by Pigott, B., in *Reg. v. Middleton*, L. R. 2 C. C. 38; *Cas. Crim. Law*, 617, and appears to be the most tenable ground on which to put the case. The difficulty with it is one of fact.

<sup>2</sup> See *Reg. v. Bradshaw*, 14 Cox, C. C. 83; *Cas. Crim. Law*, 146.

<sup>3</sup> *Reg. v. Martin*, 2 Moo. C. C. 123. *Contra*, *People v. Gordon*, 70 Cal. 467; *Hays v. People*, 1 Hill, 351.

thief to retain them in order to detect a receiver, the crime of receiving stolen property cannot be committed as to the goods.<sup>1</sup> In an analogous case, where one solicited goods by false pretences and obtained them, but the owner when he gave them up knew of the falsity of the pretence, the crime of obtaining by false pretences was not committed;<sup>2</sup> and where defendant, in order to help a prisoner of war escape, took him in her carriage beyond the lines, but he had been allowed to go to the place by the military authorities in order to detect the defendant, the crime of assisting a prisoner to escape was not committed.<sup>3</sup>

There is an exception to this doctrine in the anomalous case of larceny by trick. In such a case the owner consents to give up the goods, but the wrongdoer is held guilty of larceny because of his fraud in obtaining the consent. I have elsewhere stated certain objections to this doctrine, and have tried to show that it is of late growth, and founded on mistake.<sup>4</sup> What I have just said is another theoretical objection to it. Another exception, probably earlier established, is the doctrine of constructive breaking in burglary. According to this doctrine, burglary may exist without an actual breaking of the house, if the wrongdoer obtains entrance by fraud. Some of the earliest cases were cases of entry without consent of the owner of the house, under color of legal process,<sup>5</sup> or of entry secured by frightening an inmate so that he opened a door,<sup>6</sup> or of entry made into a door opened by an inmate, but not to let in the thief.<sup>7</sup> In none of these cases was the entry made by consent of the owner. But cases have been decided in the same way where consent to the entry was really obtained, though by fraud.<sup>8</sup> These decisions, it is submitted, were erroneous.

In some cases of criminal injury to individuals a lack of consent of the individual is not always a necessary element of the crime. Homicide, mayhem, and battery may be committed, though the individual injured consented to the injury. The reason for this is

<sup>1</sup> *Reg. v. Dolan*, 6 Cox, C. C. 449; *Cas. Crim. Law*, 765; *Reg. v. Villensky* (1892), 2 Q. B. 597.

<sup>2</sup> *Reg. v. Mills*, 7 Cox, C. C. 263; *Cas. Crim. Law*, 727.

<sup>3</sup> *Rex v. Martin, Russ. & Ry.* 196; *Cas. Crim. Law*, 156. And see *U. S. v. Adams*, 59 Fed. 674.

<sup>4</sup> 6 HARVARD LAW REVIEW, 244.

<sup>5</sup> *Farr's Case*, Kel. 43; 3 Co. Inst. 64.

<sup>6</sup> 2 East, P. C. 486, and authorities cited.

<sup>7</sup> *Le Mott's Case*, Kel. 42.

<sup>8</sup> *Cassey's Case*, Kel. 62; *Rex v. Hawkins*, 2 Russ. Cr. 9.

clear: the public has an interest in the personal safety of its citizens, and is injured where the safety of any individual is threatened, whether by himself or another. The public is not injured merely because A's property goes to B, or A destroys his own property; but it is concerned if A's head or right hand is cut off. Consent of the injured party is therefore not always a defence in a prosecution for a personal injury. A personal injury inflicted by consent may harm the public if it tends to cause a breach of the peace, or severe bodily harm to the injured party. A prize-fight, therefore, or any public fight, is criminal, in spite of the consent of the parties to it to permit injury, because it tends to a breach of the peace.<sup>1</sup> A game which involves a physical struggle may be a commendable and manly sport, or it may be an illegal contest in which all the participants are or may become criminals; this depends upon whether it is a game which endangers life. Thus, in a prosecution for a death which was caused accidentally in playing the game of foot-ball, it was left to the jury to say whether the game was dangerous; for if so, consent on the part of the players to submit to what the game had in store for them would not protect a player from prosecution. "No rules or practice of any game whatever can make that lawful which is unlawful by the law of the land, and the law of the land says you shall not do that which is likely to cause the death of another."<sup>2</sup> And where death happened accidentally while two parties were fencing with sharp foils, protected with buttons at the tips, the killer was held guilty of manslaughter.<sup>3</sup> So where the hand of a beggar was cut off at his request, both parties to the transaction were held to be criminal.<sup>4</sup>

Is the public interested in preventing less grave physical injuries, even when inflicted by consent, if the consent is obtained by fraud? It would seem not, as a general principle. A by fraud induces B to submit to a box on the ear, or to touch a hot poker and thereby get burned; the real wrong is a fraudulent one, of a sort which the public is not concerned to prevent. The party should be confined to his civil action. But where the injury is against a woman's chastity, other considerations may well prevail. It is not the business of the public, to be sure, to keep

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<sup>1</sup> *Com. v. Collberg*, 119 Mass. 350; *Cas. Crim. Law*, 148.

<sup>2</sup> *Bramwell, L. J.*, in *Reg. v. Bradshaw*, 14 Cox, C. C. 83; *Cas. Crim. Law*, 146.

<sup>3</sup> *Chichester's Case*, *Aleyn*, 12.

<sup>4</sup> *Wright's Case*, *Co. Lit.* 127 a; *Cas. Crim. Law*, 145.



women chaste against their will; but is it not the concern of the public to prevent women losing their chastity against their will? And many cases have occurred where, although we must say the physical connection was consented to, yet there was no consent to become unchaste. One way of securing the result indicated would be to punish the man as a seducer; but this, at common law, would be trenching on the ground of the ecclesiastical courts, and, besides, seduction is generally a much less aggravated offence than the one under discussion. Another way of securing the desired result remains. The seducer has committed a technical battery; and if we say that the consent of the woman shall not in such a case protect the seducer from prosecution, we may punish him. We have only to say that he has injured the public in spite of the consent; and I, for one, should be inclined to say this as readily in the case of a fraudulent seduction as in the case of an act tending to a breach of the peace.

And so in fact the authorities say, although they do not expressly lay down such a reason for their decision. Where a woman's consent to connection is obtained by such a misrepresentation as to the nature of the act as, if true, would make it not unchaste, but entirely proper, the seducer may be punished for assault and battery. Thus, one who secures connection with a woman by personating her husband, may be punished for assault and battery.<sup>1</sup> And this principle appears to offer the best explanation of the decision in *Reg. v. Case*,<sup>2</sup> where a physician obtained connection under pretence of medical treatment. Thus the public is not without remedy in these cases, although the wrongdoer cannot be punished for rape. The Scotch law treats the matter in the same way. The offence is not rape, but "an innominate offence,"—that is, a misdemeanor.<sup>3</sup>

We have seen, then, the impropriety of confusing lack of consent with ineffectiveness of consent. If consent exists, we must not refuse to recognize its existence. But in many cases a wrongdoer may not be absolved from guilt, though what he did was done with the consent of the sufferer. If he is charged with that sort

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<sup>1</sup> *Reg. v. Saunders*, 8 C. & P. 265.

<sup>2</sup> 4 Cox, C. C. 220; *Cas. Crim. Law*, 435.

<sup>3</sup> *Reg. v. Sweeney*, 8 Cox, C. C. 223. This principle would seem not to cover the case of mere assault, without physical contact. The peculiar wrong to be guarded against is not then accomplished, even in part. The English case of *Reg. v. Martin*, already referred to, was therefore correctly decided. See, however, *Hays v. People*, 1 Hill, 351.

of crime which is inconsistent with consent of the injured party, such consent is of course a perfect disproof of the crime; but in cases of actual personal injury, whether homicide, mayhem, or battery, consent of the injured party is no excuse to the wrongdoer if the act consented to tends to a breach of the peace or to severe bodily harm, or to a loss of chastity which is not consented to.

*J. H. Beale, Jr.*

SWIFT *v.* TYSON VERSUS GELPCKE *v.*  
DUBUQUE.

SO much has been written and spoken about the cases of Swift *v.* Tyson,<sup>1</sup> and Gelpcke *v.* Dubuque,<sup>2</sup> that as subjects of legal discussion they may well seem exhausted. The recent publication, however, of various addresses and essays<sup>3</sup> recalling the attention of lawyers to the question of judicial legislation, and especially to the question of the real nature and effect of judicial action in the decision of a case not controlled by statute or precedent, has prompted a consideration of these cases, as related to each other, and as indicative of the position assumed by the Supreme Court of the United States with respect to this long mooted controversy.

The point in dispute is clearly and briefly defined by what may be called a comparison of the pleadings; that is, by contrasting the propositions advanced on either side by the advocates engaged. In the introduction to his Commentaries Blackstone asserts that a judge "is not delegated to pronounce a new law, but to maintain and expound the old one,"<sup>4</sup> and defines the effect of a decision overruled by stating that "if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was bad law, but that it was not law."<sup>5</sup> The decisions of courts of justice, according to him, are only "the evidence of what is common law,"<sup>6</sup> and "the judge is only to declare and pronounce, not to make and new-model the law."<sup>7</sup> At a time when a comprehensive and systematic view of the principles of the common law was itself a novelty, and the study of the philosophy of the law hardly had a beginning in England, these opinions met the approval of the very

<sup>1</sup> 16 Peters, 1.

<sup>2</sup> 1 Wallace, 175.

<sup>3</sup> Among others the following:—

"Provinces of the Written and Unwritten Law" and "The Ideal and the Actual in the Law." Addresses by Mr. James C. Carter.

Prof. W. G. Hammond's Notes to Blackstone's Commentaries (1890), Vol. I. p. 213 *et seq.*

"Judicial Legislation: Its Legitimate Function in the Development of the Common Law." Mr. E. R. Thayer. 5 HARV. LAW REV. 172.

"Some Definitions and Questions in Jurisprudence." Prof. J. C. Gray. 6 HARV. LAW REV. 21.

<sup>4</sup> Page 70.

<sup>5</sup> Page 70.

<sup>6</sup> Page 71.

<sup>7</sup> Book 3, p. 327.



few who had given any thought at all to the subject, and received the ready acquiescence of the legal profession. Since then they have been often quoted approvingly from the Bench, and if a great preponderance of judicial opinions is to be conclusive of the question, they correctly represent to-day the nature of our unwritten law. The majority of philosophical and non-judicial writers, on the other hand, have regarded Blackstone's conclusions as superficial and unsound. Austin, the best known of these, speaks of "the childish fiction employed by our judges that judiciary or common law is not made by them, but is a miraculous something made by nobody, existing, I suppose, from eternity, and merely declared from time to time by the judges,"<sup>1</sup> and announces his own opinion to be that the *ratio decidendi* (or the ground or principle of a judicial decision which is not merely an application of pre-existing law) is itself a law, or performs the functions of a law.<sup>2</sup> The issue framed by this conflict of opinion can be thus stated: Does a judge, in deciding a case in which he is not directed by statute or bound by judicial precedent, create the law announced by his decision?

It is obvious that an agreed definition of the word "law" in this issue is an indispensable requisite of an intelligent discussion. Indeed the absence of such an agreement will account for much of the difference of opinion upon the main inquiry. Whether law is the command of a sovereign, or exists in the customs of society independently of such command, or is measured and defined by the development of the opinion of the community upon questions of ethics, are abstract questions of legal philosophy of which a universally acceptable solution has yet to be found; and those who have written of judicial legislation have held widely differing views upon them. It seems proper, therefore, before proceeding further, to say that the writer ventures no opinion regarding these questions, and that for the purposes of this article a definition will be assumed, and the word "law" will be used as meaning a rule of conduct enforced by the process of the courts. This is the law with which judges have to deal. The word "legislation" will mean the process by which such a rule is created. That an Act of the legislature is such a process, and that such Acts make but a small part of the rules which it is the duty of courts to enforce, all

<sup>1</sup> Jurisprudence (4th ed.), Vol. II. p. 655.

<sup>2</sup> Jurisprudence, Vol. II. p. 649. In accord, see also Maine's *Ancient Law*, p. 14; Holland's *Jurisprudence*, Chap. V. pp. 53, 56; Digby's "History of the Law of Real Property," p. 63; Markby's *Elements of Law*, p. 61.

will agree. The question whether the remaining part is not made by the courts themselves is the question of judicial legislation with which this article is concerned; and that question, under the definitions assumed, seems to be one of small difficulty. The rules which courts *will* enforce can only be known by the rules which courts *do* enforce, and which are to be found in their decisions. Whatever adds to or subtracts from these rules is legislation. By reason of the importance attached by our system of law to judicial precedent, the decision of a particular case extends its effect to subsequent cases arising upon the same facts, and announces not only a rule for the determination of the case in which it is made, but a general rule for all cases to which it is applicable, — a rule, that is to say, which until it is changed is included in the body of rules enforceable by the courts, and is, therefore, according to the definition, a rule of law. In this narrow view, whenever a judge takes a rule, no matter where he finds it, provided it is not in an Act of the legislature or in the decisions of the courts, and, by enforcing it in a particular case, adds it to the rules which courts will thereafter enforce, he necessarily legislates. That to assume the definitions of law and of legislation begs the whole question of judicial legislation, as commonly discussed, is doubtless true; but to discuss that question is foreign to the present purpose.

In examining the discussions by the courts of the issue thus raised with respect to judicial legislation we are met on the very threshold of our inquiry by the question whether it can ever, in a judicial sense, be decided by the courts; whether, that is, upon any state of facts a court can be compelled to decide it in order to decide the case. Is it anything more than a question of legal and philosophical speculation, and can it in any given case be brought within the boundaries of that law which judges must pronounce in order to do justice between litigants? This is a question not readily or confidently to be answered, yet one which, as the writer thinks, is finally capable of an affirmative reply. In cases calling for the application of the law of a foreign jurisdiction a court may be called upon to decide whether the decisions of the foreign courts are or are not laws. The opinions expressed by judges upon the nature of their own action in particular cases are of necessity mere *obiter dicta*. It is impossible for any state of facts squarely to present to a court the question whether it has itself made law.<sup>1</sup>

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<sup>1</sup> The case of *Pierce v. Pierce*, 46 Ind. 86, is interesting in this connection.

By the twenty-fifth section of an Act of Indiana of 1852, three-fourths of the property



There are many cases, to be sure, whose decision strongly suggests the question of judicial legislation to all observers, but of these

of a decedent would have descended to his widow, but by an Act of 1853 that section was amended so as to divide the estate equally between the widow and mother. In *Langdon v. Applegate*, 5 Ind. 327, the Supreme Court decided that amending Acts which failed to recite the amended section in full were unconstitutional. The Act of 1853 fell within that ruling. An administrator, in compliance with that rule, had conducted his distribution according to the Act of 1852, and had ignored the Act of 1853. In *Turnpike Co. v. The State*, 28 Ind. 382, the case of *Langdon v. Applegate* was expressly overruled, and the Act of 1853 declared to be constitutional. The court held the administration invalid, saying:—

“The consequence of the overruling of those cases (*Langdon v. Applegate*, and others to the same effect) was that the statutes which, according to the rulings therein, would have been held unconstitutional, were valid, not from the time of overruling those cases, but from the time of their enactment until they were repealed. It was not the overruling of those cases which gave validity to the statutes; but the cases having been overruled, the statutes must be regarded as having all the time been the law of the State. This court has no power to repeal or abolish statutes. If it shall hold an Act of the Legislature unconstitutional, while its decision remains the Act must be regarded as invalid. But if it shall afterward come to the conclusion that its former ruling was erroneous, and overrule it, the statute must be regarded for all purposes as having been constitutional and in force from the beginning, and the rights of parties must be determined accordingly.”

In other words, the Statute of 1853 never was unconstitutional, and the decision in *Langdon v. Applegate* never was the law of the State. This is about as near as a court can be brought to deciding whether it has itself legislated or not. Observe, though, that the case does not necessarily call for the opinion delivered. It may well be that the decision of *Langdon v. Applegate* was the law of Indiana until the case of *Turnpike Co. v. The State*, and that the latter decision *changed the law* retroactively,—a power denied to legislatures, but constantly exercised by courts. This seems to have been the view of the Court of Queen's Bench in a similar case, *Henderson v. Folkestone Waterworks Co.*, 1 Times Law Rep. 329. There a house owner sued a water company for rates paid by him in excess of what had since been held to be legal by the House of Lords. The defendant pleaded that the payment was voluntary.

“It was,” said plaintiff's counsel, “a payment in ignorance of law.”

Lord Coleridge: “Of what law? I was ignorant of it before the decision of the House of Lords. I had held the contrary, and two eminent judges agreed with me. Can that be put as ignorance of law?” Later, in giving judgment for the defendant, the Lord Chief Justice said:—

“Here at the time the money was paid, which was before *Dobb's* case (the House of Lords' decision), *the law was in favor of the company*, and there is no authority to show that it can be recovered back on account of a judicial decision reversing the former understanding of the law.”

Since money paid under a mistake of law cannot be recovered in England, the dispute with counsel as to what constitutes a mistake of law had no direct bearing on the case; and the case is further distinguishable from the Indiana decision by the fact that the Queen's Bench is a court of subordinate jurisdiction, whereas in the Indiana case the opposite rulings were both made by the Supreme Court. The interruptions from the Bench show plainly, though, that the mind of the learned judge was not in accord with what the Indiana court had declared to be the status of an overruled decision. According to *Pierce v. Pierce*, the decision of the Lord Chief Justice and his associates, in view of *Dobb's* case, could certainly be put as ignorance of law.



very few indeed require a ruling upon that question by the judges themselves. Decisions without precedent and decisions by which prior cases are overruled are common instances, of the larger class. The former, it is quite plain, cannot present the question of judicial legislation for decision; but in cases which fall under prior rulings of the court the distinction is not so clear, and has been frequently ignored.

In the great majority of cases the record discloses a state of facts covered by a prior decision, upon which one of the parties relies. To follow that decision involves no opinion whatever upon the nature of that decision as respects the question of judicial legislation. That question must in any case be subsidiary to the inquiry, What is the law governing the facts before the court? and that inquiry, as regards the law of the jurisdiction, is closed by the prior decision invoked. The determination of whether or not that decision made the law announced by it, can have no bearing on the case at bar. And so, if the decision is overruled and the law to be applied in similar cases is changed. This is, according to the now commonly received opinion, a very satisfactory example of legislation by judges; but there is no possible occasion for the court to declare itself on the matter. Whether the court is changing the law, or merely correcting an erroneous declaration of it, cannot in any way affect the judgment to be rendered.

Thus, if the question should be raised in the New York Court of Appeals whether a legatee by murdering a testator had invalidated a bequest to him in the will, the court would be bound by *Riggs v. Palmer*<sup>1</sup> to decide that he had. That decision pronounced the law which, unless it is squarely overruled, must govern all subsequent cases involving the same facts. The decision of the case at bar cannot be affected by the question, whether the effect of that case was not the embodiment of an exception in the local statute of wills or an amendment of the provisions of the Penal Code prescribing the punishment for murder. Neither to affirm it nor to overrule it indicates any opinion upon that question. The decision of a case overruling *Riggs v. Palmer* is entirely consistent with either one of two opinions: (1) that *Riggs v. Palmer* never was the law, that is, that the decision of that case did not embody the rule it announced in the law of the state; or, (2) that the law created by that decision is a bad law and shall be changed retro-

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<sup>1</sup> 115 N. Y. 506.

actively, so that hereafter facts falling within that ruling shall be governed by the present decision without reference to the time of their occurrence. The decision would be the same, whether *Riggs v. Palmer* was an instance of judicial legislation or not.

Where a court is examining the unwritten law of a foreign jurisdiction the situation appears to be different. The decisions of the foreign courts are neither the laws nor the evidence of the laws of the court. The courts of one State are powerless to make or to declare the laws which shall govern another. There are cases, nevertheless, in which a court is called upon to declare what is the law of another jurisdiction. Such a case, for example, is one in which the parties have agreed to refer their conduct to the standard of a foreign law. To decide the case it is necessary for the court to state what is the foreign law. The court, indeed, has the power to examine and to decide the case on the merits, independently of the foreign law, for it is certain that its decision can never be reversed by the foreign courts; but such a course would be a gross abuse of power, and is, as a matter of fact, rarely resorted to. The decisions of such cases invariably profess to be according to the foreign law agreed upon. Suppose that in such a case a decision in point of the foreign court of last resort is cited. What, if anything, will the decision of the case necessarily affirm of the foreign decision? If it is followed and applied, the court may be declaring either (1) that it is the law of the foreign state, or (2) that it is conclusive evidence of that law. Clearly there is no question of judicial legislation decided here. But how, if it is repudiated and a different rule is applied to the decision of the case? In that event we have seen that in the case of a domestic decision the court may be declaring either (1) that the decision cited never was the law, or (2) that, though it was the law, it is now changed. In the case of a foreign decision the second alternative is absent, for the court has no power to change the foreign law. To repudiate the foreign decision, therefore, necessarily involves the opinion that it is not the law of the foreign state, which is equivalent to saying that the judges who made it did not make it a part of the law of that state, and that they did not legislate. An illustration of such a ruling in practice is provided by the case of *Faulkner v. Hart*<sup>1</sup> in the New York Court of Appeals. The facts, which were submitted to the court in an agreed statement,

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<sup>1</sup> 82 N. Y. 413.

were these: The plaintiffs contracted in New York with a transportation company for the carriage of certain goods by that company from New York to Boston, and for delivery to the plaintiffs, who were the consignees. The goods were received by the defendants who were connecting carriers over the latter part of the route, and were residents of Massachusetts. The plaintiffs called for the goods when they arrived at Boston, but a delivery was refused until the next day, as it was not convenient to deliver them. They were unloaded and placed in the defendant's warehouse the same afternoon, but too late for delivery; and during the night the warehouse with the goods was destroyed by fire. The action was to recover the loss. The defendants cited decisions of the Supreme Court of Massachusetts,<sup>1</sup> to show that they were not liable, and it was admitted in the opinion that under those decisions the operators of a railroad, as matter of law, cease to be common carriers and become warehousemen, when the duty of transportation is completed and goods are deposited in a warehouse to await the orders of the consignee. Nevertheless the court reversed the judgment for the defendant affirmed by the general term of the court below, and ordered judgment for the plaintiff in the amount of his claim. If the earliest Massachusetts decision covering the point in issue made the law for that State, the New York court could not refuse to follow it, without flagrantly shirking its duty. If it was no more than evidence of the law, the court was of course at liberty to disregard it in the light of better evidence. The court itself seems to have taken this view, for the opinion concedes that, if there had been a positive statute of Massachusetts providing that a carrier's liability should cease when the goods had been deposited in a suitable warehouse at the end of the route, a different conclusion would have been required. There was no intention on the part of the court to repudiate the law of Massachusetts; the intention was to declare what that law was. This is quite apparent in these concluding sentences of the unanimous opinion delivered by Judge Miller:

"The rule adopted in the Massachusetts cases cannot be sustained. It should not be overlooked that the point presented does not involve solely a question as to a local law, but part of a system of general commercial law. That the court in Massachusetts had decided the law contrary to

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<sup>1</sup> *Norway Co. v. B. & M. R. R. Co.*, 1 Gray, 263; *Rice v. Hart*, 118 Mass. 201; and others.



what it was is not controlling; for it may be assumed, even if the parties had knowledge of the decision, that they knew it was contrary to the current of authority in similar cases, and contracted, having in view the law as it actually existed. Like an unconstitutional law, void of itself, *the decision was not the law*, and is not to be regarded as authority for that reason."

These observations have been thought proper by way of preface to the present discussion, to define its limits. It is not proposed to consider the cases of *Swift v. Tyson*, and *Gelpcke v. Dubuque* primarily as instances of judicial legislation, but because in the views taken of them by the court it was in each of them necessary to pronounce judicially upon the effect of final decisions in a foreign jurisdiction, and so upon the question of whether or not they were laws. This will appear more clearly after a brief statement of certain elementary propositions respecting the court's jurisdiction.

With the exception of suits between citizens of the same State claiming land under grants from different States, the appellate jurisdiction of the Supreme Court is confined by the Constitution to two classes of suits. Cases may come up from both the inferior Federal courts and from the State courts of last resort because they involve questions arising under the Constitution, treaties, or laws of the United States; and cases of all kinds may come up from the former courts, which have acquired jurisdiction solely by reason of the fact that the parties are citizens of different States. In these two classes of cases the Supreme Court exercises widely different functions. In cases involving Federal questions there can be no doubt whatever of the law to be applied by the court. It is the law of its own government; that is, the law of the United States in the sphere of its sovereignty. The subject-matter of the suits falls under Federal cognizance only; the questions involved arise under laws of the United States which are declared to be the supreme law of the land, and which are foreign and superior to the laws of the quasi-sovereignties of the States which compose the Union. That the laws of the United States should be ultimately construed by the courts of any other government is a proposition not to be seriously considered.<sup>1</sup> In the second class of cases, on the

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<sup>1</sup> "If there are such things as political axioms, the propriety of the judicial power of a government being coextensive with its legislative may be ranked among the number." Hamilton, *The Federalist*, No. LXXX.

other hand, the Federal jurisdiction is not exclusive, but concurrent with that exercised by the courts of the States. The subjects of the suits are not matters of Federal control. The law to be administered is not United States, but State law, — the Federal courts, of course, act within their own jurisdiction in one sense; but that jurisdiction only calls for the administration of the law of another government, namely, the State where the controversy arose, or in reference to whose laws the parties have dealt, so that ultimately the law to be applied is the law of a foreign jurisdiction.

It would seem that upon the question of what is the law of a given State the decision of the highest court of that State should be conclusive, whether we regard the decision as being itself the law or merely as evidence of the law, and that the sole duty of the Federal court in the exercise of this peculiar jurisdiction is to discover, if possible, from the precedents and analogies to be found in the decisions of the State courts, a rule covering the case before it, and then to apply that rule. The Federal judges should be as much bound by a State decision upon a question of State law, as a State court is bound by a Supreme Court decision upon a question of Federal law.

Only thus can the purposes of the jurisdiction be fully answered. The best contemporary evidence accessible, read in the light of recognized principles of statutory construction, supports this proposition. Before the adoption of the Constitution, suits between citizens of different States were tried in the State courts, there being no other. The evil felt and feared in this system was the effect of prejudice against suitors who were not citizens, and the remedy sought was the creation of an impartial tribunal to administer the law of the State in which it sat.<sup>1</sup> This was the understanding of Hamilton, who, indeed, regarded this jurisdiction as auxiliary to the constitutional provision that the citizens of each State shall be entitled to all the privileges and immunities of the citizens of the several States. "If," he wrote, "it be a just principle that every government ought to possess the means of executing its own provisions by its own authority, it will follow that in order to the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled, the national judiciary ought to preside in all cases in which one

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<sup>1</sup> Elliott's Debates, Vol. III. pp. 533, 534, 549, 557, 566.

State or its citizens are opposed to another State or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal which, having no local attachments, will be likely to be impartial between the different States and their citizens."<sup>1</sup> The privilege of a citizen of Massachusetts who sues a fellow-citizen is to receive a just application of the law of that State, and, to comply with the Constitution, the privilege of a citizen of Connecticut suing in Massachusetts need be neither more nor less, but the same.<sup>2</sup> It was to secure this end that jurisdiction was conferred upon the Federal courts.<sup>3</sup>

It is worth noting, too, in this connection that since the object of the makers of the Constitution was to put the parties upon terms of equality, an enlargement of the jurisdiction which favors an alien results in an evil of the same degree and character as when a citizen receives the benefit of the court's bias.<sup>4</sup> Moreover, the first Congress, many of whose members had taken part in the framing of the Constitution, passed a law declaratory on the subject, and provided that in the Circuit Courts in trials at common law the laws of the several States should be regarded as rules of decision.<sup>5</sup>

In construing this statute, however, a distinction has been made by the court, and "the laws of the several States" have been held not to include the laws declared by the courts, and to refer only to the laws of the Legislature. That the decisions of State courts construing State constitutions and statutes should control Federal decisions upon the same question seems never to have been doubted by the court before *Gelpcke v. Dubuque*. "The judicial department of every government, where such department exists," wrote Chief Justice Marshall, "is the appropriate organ for con-

<sup>1</sup> The Federalist, No. LXXX.

<sup>2</sup> The sole object for which jurisdiction of cases between citizens of different States is vested in the courts of the United States is to secure to all the administration of justice upon the same principle upon which it is administered between citizens of the same State." Mr. Justice Johnson, in *Polk's Lessee v. Wendell*, 5 Wheat. 293, 302.

<sup>3</sup> *Ibid.*

<sup>4</sup> Mr. Geo. W. Pepper has discussed this whole subject very clearly in a little book entitled "The Borderland of State and Federal Decisions."

<sup>5</sup> "The laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." Act of Sept. 24, 1789. § 34; 1 Statutes at Large, 92; Rev. Stat. § 721.



struing the legislative Acts of that government. . . . On this principle the construction given by this court to the Constitution and laws of the United States is received by all as the true construction; and on the same principle the construction given by the courts of the several States to the legislative acts of those States is received as true, unless they come in conflict with the Constitution, laws, or treaties of the United States."<sup>1</sup>

In a later case, *Shelby v. Guy*,<sup>2</sup> the Supreme Court, in declaring the meaning to be given to the words "beyond the seas" in a Tennessee statute, said: "Nor is it questionable that a fixed and received construction of their respective statute laws in their own courts makes, in fact, a part of the statute law of the country, however we may doubt the propriety of that construction. It is obvious that this admission may at times involve us in seeming inconsistencies, as where States have adopted the same statutes and their courts differ in the construction. Yet that course is necessarily indicated by the duty imposed on us to administer, as between certain individuals, the laws of the respective States, according to the best lights we possess of what those laws are."

There is certainly no room in this argument for the distinction which has been taken. It applies with equal force to all the final decisions of State courts. The judicial department of a government is not more appropriately engaged in the exposition of statutes than in the declaration of unwritten law. The latter is in truth its principal business. And the judicial construction of a statute is no more a part of the law of a State than any other decision. It is liable to be overruled, amended, or qualified, in common with other adjudications. The suggestion that a judicial construction makes a part of the statute, is more plausible than sound. If a statute in New York commands that certain instruments shall be sealed, and the Court of Appeals decides that the letters "L. S." on those instruments make a seal, is that decision any more a part of the law of New York than if it had been made in exposition of the common law? It is not literally a part of the statute. To allow to it the efficacy of written law, admits all that is claimed for a common law decision, for few statutes can be interpreted without resorting to the common law for rules of construction and for definitions. Would the same distinction be made to-day in construing the clause of the fourteenth amendment to the Constitution, which

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<sup>1</sup> *Elmendorf v. Taylor*, 10 Wheat. 152, 159.

<sup>2</sup> 11 Wheat. 361, 367.

ordains that no State shall deny to any person within its jurisdiction the equal protection of "the laws"? Does this, too, refer only to statutes? Or does it embrace all the rules and regulations, legislative and judicial, which govern the relations of citizens to each other and to the State? It will be interesting to see how far the court will sacrifice to consistency when this question is presented to them.

In individual opinions of members of the court the distinction has, in fact, been more than once abandoned. There is no suggestion of it, for example, in the following dissenting opinion of Mr. Justice Johnson in *Daly v. James*<sup>1</sup>: —

"Upon the question so solemnly pressed upon this court in the argument how far the decision of the Court of Pennsylvania ought to have been considered as obligatory on this court, I would be understood as entertaining the following views: As precedents entitled to the highest respect the decisions of the State courts will always be considered; and in all cases of local law we acknowledge an established and uniform course of decisions of the State courts in the respective States as the law of this court; that is to say, *that such decisions will be as obligatory upon this court as they would be acknowledged to be in their own courts.*"

In *Beauregard v. New Orleans*,<sup>2</sup> Mr. Justice Campbell said of this jurisdiction: —

"Upon cases like the present, the relation of the courts of the United States to a State is the same as that of its own tribunals. They administer the laws of the State, and to fulfil that duty they must find them as they exist in the habits of the people and in the exposition of their constituted authorities. Without this, the peculiar organization of the judicial tribunals of the States and the Union would be productive of the greatest mischief and confusion."

The argument is briefly and forcibly stated in a recent dissenting opinion of Mr. Justice Field in *B. & O. R. R. Co. v. Baugh*,<sup>3</sup> as follows: —

"The theory upon which inferior courts of the United States take jurisdiction within the several States is, when a right is not claimed under the Constitution, laws, or treaties of the United States, that they are bound to enforce as between the parties the law of the State. It was never supposed that upon matters arising within the State any law other than that of the

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<sup>1</sup> 8 Wheat. 495, 542.

<sup>2</sup> 18 How. 497, 502.

<sup>3</sup> 149 U. S. 368, 403.

State would be enforced, or that any attempt would be made to enforce any other law. It was never supposed that the law of the State would be enforced differently by the Federal courts sitting in the State and the State courts; that there would be one law when a suitor went into the State courts, and another law when the suitor went into the Federal courts, in relation to a cause of action arising within the State,—a result which must necessarily follow if the law of the State can be disregarded upon any view which the Federal judges may take of what the law of the State ought to be rather than what it is.”<sup>1</sup>

The decisions in such cases, however, particularly those made in the last half century, show plainly that the court does not now assent to this view of its duty, and refuses to regard the decisions of State tribunals as obligatory upon it. To be sure, it may still be said to be the general rule that in determining what is the law of a State the Supreme Court will follow the decisions of its highest court; but this rule is stated as one voluntarily adopted by the court for one reason or another, and not as a duty imposed upon it by the organic law. Thus, in cases involving the title to real property, and in questions of wills, inheritance, and descent, as well as in most cases of statutory construction, it is almost invariably the rule that the local decisions will be given a controlling effect. The reason usually assigned is, in real property cases, that the *lex rei sitae* should govern; and, in the other cases, that great confusion and mischief would result from the adoption of any other rule. The true reason, that the court is administering, not its own, but a foreign law, is no longer advanced.

In two lines of cases of particular importance the Supreme Court refuses to follow this general rule, and applies a law of its own, though if the reason here suggested for the rule be sound, the cases are not distinguishable on principle from those which adhere to the rule. The court has repeatedly announced that in matters of what is variously called “general commercial law,”<sup>2</sup> “gen-

<sup>1</sup> The theory of obligation is supported also by the opinions in *Dred Scott v. Sandford*, 19 How. 393. The majority of the court in that case concurred in the opinion of Mr. Justice Nelson that upon the question of the effect of the plaintiff's temporary residence in a free State they were concluded by the decision of the Supreme Court of Missouri.

“Our conclusion therefore is,” the opinion reads, “upon this branch of the case, that the question involved is one depending solely upon the law of Missouri, and that the Federal court sitting in the State, and trying the case before us, was bound to follow it.”

<sup>2</sup> *Oates v. National Bank*, 100 U. S. 239; *Brooklyn City R. R. Co. v. National Bank*, 102 U. S. 14.



eral law,"<sup>1</sup> "general jurisprudence,"<sup>2</sup> and "common law,"<sup>3</sup> it will not follow the decisions of the local courts,<sup>4</sup> even though the construction of a statute be involved; and it is equally emphatic in the declaration that it will protect contract rights in all cases where the decision of a court under which they have accrued has been subsequently overruled by that court.<sup>5</sup> Of the first line, the typical and leading case is *Swift v. Tyson*; of the second, *Gelpcke v. Dubuque*.

*Swift v. Tyson* came before the court in 1842 on a certificate of division of opinion from the Circuit Court for the Southern District of New York. It was a suit on a bill of exchange by an indorsee, a citizen of Maine, against the acceptor, a citizen of New York. The defence was fraud and failure of consideration. The answer to a bill of discovery, filed by the defendant, disclosed that the bill had been taken by the plaintiff in satisfaction of a pre-existing debt, and thereupon the question arose on the trial whether the defendant was entitled to give evidence of fraud and failure of consideration against the plaintiff, as if the suit had been between the original parties to the bill, — in other words, was the plaintiff a holder for value? This was the question certified to the Supreme Court. It was argued for the defendant that by the law of New York the satisfaction of a debt in such cases was not a valuable consideration, and that the New York decisions should be conclusive to admit the evidence. The Supreme Court decided that the evidence offered was inadmissible. Mr. Justice Story, in delivering the opinion, reviewed the New York cases, and announced that in the absence of a positive opinion of the Court of Errors on the point, the law of that State could not be regarded as finally established. Here, then, seems to have been a proper opportunity for the Supreme Court to render an independent judgment, there being, one might say, no State law governing the case. Had the learned justice done this, without more, the case would probably have escaped the torrent of hostile criticism that has been directed against it. The opinion, however, went on to assume that it was firmly settled by the law of New York that the

<sup>1</sup> *Hough v. Railroad Co.*, 100 U. S. 213, 226.

<sup>2</sup> *Railway Co. v. Prentice*, 147 U. S. 101, 106; *Insurance Co. v. Broughton*, 109 U. S. 121, 126.

<sup>3</sup> *Chicago v. Robbins*, 2 Black, 418.

<sup>4</sup> See the cases collected in the note to *Burgess v. Seligman*, 107 U. S. 20, 34.

<sup>5</sup> In *Taylor v. Ypsilanti*, 105 U. S. 60, 71, this is said to be "no longer open to question in this court."

plaintiff had given no consideration, and then declared that the Supreme Court was under no obligation to apply that law.<sup>1</sup> The defendant had urged that the case was controlled by the thirty-fourth section of the Judiciary Act, providing that the laws of the several States shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply; and there was no answer to this, except to say that the law of a State is not to be found in the decisions of its courts. The question of judicial legislation, as already defined, was therefore plainly involved. The opinion met the issue without evasion, and adopted the old fiction without hesitation.

"It will hardly be contended," it said, "that the decisions of courts constitute laws. They are at most only evidence of what the laws are, and are not of themselves laws. They are often re-examined, reversed, and qualified by the courts themselves, wherever they are found to be either defective, or ill-founded, or otherwise incorrect. The laws of a State are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long established local customs having the force of laws. . . . We have not now the slightest difficulty in holding that this section upon its true intendment and construction is strictly limited to local statutes and local usages of the character before stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence."

This decision is the origin of the anomalous doctrine of the general commercial law, now firmly established in the jurisprudence of the United States. Few defend it now on any ground but that of expediency, and the decisions which apply it admit by a fair implication that its title to respect rests chiefly on prescription.<sup>2</sup> Certainly it is difficult to define the position of the general

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<sup>1</sup> This doctrine is now established by many decisions. See the cases reviewed in Mr. Justice Brewer's opinion in *B. & O. R. R. Co. v. Baugh*, 149 U. S. 368.

In *Watson v. Tarpley*, 18 How. 517, the court, in deference to the general commercial law, refused to apply a statute of Mississippi prescribing the time when the payee or indorsee of a bill of exchange, upon refusal to accept by the drawee, can sue the drawer. The opinion, curiously enough, was delivered by that most determined upholder of State rights, Mr. Justice Daniel.

<sup>2</sup> *B. & O. R. R. Co. v. Baugh*, 149 U. S. 368. Mr. Justice Field in that case expresses his repentance that he ever assented to the doctrine of *Swift v. Tyson*, and declares his faith (p. 403) that "this, like other errors, will in the end die among its worshippers."

commercial law before this case. In what sense was it "general"? If by this is meant that it was the law in a great majority of jurisdictions professing to be governed by the same law, it was none the less not the law of New York, as declared by the authority established finally to determine that law. If it means that it was the law of the United States, as distinguished from the several States, the authority to pronounce and enforce it must be found in the Constitution, and the Constitution makes no reference to the subject. What was really done by *Swift v. Tyson* was to provide an unusually clear example of the very truth which the opinion denied. It created for commercial cases a common law of the United States. Before that, the existence of such a thing had often been denied.<sup>1</sup> The rule of the case is law now, because the United States government through its courts and marshals will enforce it. It was not law before that case, however commendable to reason, because there was no government or authority to enforce it.

For our present purpose it is to be noted that on the admission made in the opinion as to the law of New York, the case was one which squarely raised the question whether or not the decisions of courts are laws, that is, whether or not judges make law, and that the court answered it in the negative, rating the decisions of courts even below local customs in this respect. To this opinion the court has since clung, if one may judge solely by what it has said on the subject. Let us now see if it has uniformly acted upon it.

*Gelpcke v. Dubuque* required a construction of certain sections of the Constitution and of a statute of the State of Iowa. The Supreme Court of that State prior to 1859 had rendered a series of decisions<sup>2</sup> upholding the right of the Legislature to authorize municipal corporations to subscribe for the bonds of railroad companies whose lines extended beyond the corporate limits. In 1859 the court, though conceding that bonds issued under such laws were valid in the hands of innocent purchasers, decided by a narrow majority to restrain a proposed issue.<sup>3</sup> In 1862 the turn about was completed by a unanimous decision squarely overruling

<sup>1</sup> Tucker's Blackstone, Vol. I. Appendix, 422-433; *Wheaton v. Peters*, 8 Pet. 591, 658.

<sup>2</sup> *Dubuque Co. v. Pacific R. R. Co.*, 4 Greene, 1; *The State v. Bissel*, 4 Greene, 328; *Clapp v. Cedar Co.*, 5 Iowa, 15; *Ring v. Johnson Co.*, 6 Iowa, 265; *State v. Johnson Co.*, 10 Iowa, 157.

<sup>3</sup> *Stokes v. County of Scott*, 10 Iowa, 166.



the prior cases, and holding that the Legislature was forbidden by the Constitution to grant such an authority.<sup>1</sup>

Meantime, in July, 1857, the city of Dubuque, acting under legislative authority, issued certain coupon bonds in payment for stock of the Dubuque Western Railroad Company. The bonds were payable to bearer in New York. Default was made in the payment of interest, and the plaintiffs, who were holders for value, sued the city on the overdue coupons in the United States District Court for the District of Iowa, then sitting as a Circuit Court. The defence was that the law authorizing the bonds was unconstitutional. To the alleged conflict between the law and the Constitution the plaintiffs demurred. The demurrer was overruled and judgment entered for the defendants, whereupon the plaintiffs sued out a writ of error to the Supreme Court of the United States, which reversed the judgment and sent the case back for trial.

The case turned wholly upon the question of legislative power, and it was urged for the city that inasmuch as this question had been decided adversely to the power by the Supreme Court of Iowa, it only remained for the Supreme Court of the United States to apply the undoubted law of the State and to affirm the judgment. This view of their duty, however, was not acceptable to the court, and all the judges, except Mr. Justice Miller, who vigorously dissented, concurred in the feeble and impertinent<sup>2</sup> opinion delivered by Mr. Justice Swayne, who advanced as the court's reasons for disregarding the Iowa decision (1) that the law could not be considered settled, since the Supreme Court of Iowa had once changed its mind and might do so again; and (2) that if it were settled, it could only apply in future, and was harmless to invalidate contracts made before its declaration. "The sound and true rule is," the opinion quoted from *Ohio Life and Trust Co. v. Debolt*,<sup>3</sup> "that if the contract when made was valid by the laws of the State as then expounded by all departments of the government, and administered in its courts of justice, its validity and

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<sup>1</sup> *The State v. County of Wapello*, 13 Iowa, 388.

<sup>2</sup> "We shall never immolate truth, justice, and the law, because a State tribunal has erected the altar and decreed the sacrifice." 1 Wallace, 206.

<sup>3</sup> 16 How. 416, 432. This case came to the Supreme Court by writ of error to the Supreme Court of Ohio, and the Federal question involved was whether the obligation of a contract was impaired by an Act of the Legislature of that State. The existence of a contract in the case was held to be a question for the independent judgment of the Supreme Court. The opinion of Mr. Chief Justice Taney had therefore no application at all to *Gelpcke v. Dubuque*.

obligation cannot be impaired by any subsequent action of legislation, or decision of its courts altering the construction of the law."<sup>1</sup>

It is a sufficient answer to the first reason that the Supreme Court of Iowa was fully competent to reverse its own decisions, if so inclined, and that the law upon any subject cannot be said to be unsettled because it may have passed through changes. The second reason is what has made the opinion memorable, and that which concerns the present discussion. To abide firmly by *Swift v. Tyson* the court should have considered neither local ruling as law, but only as evidence of the law. The earlier decisions, when declared to be false evidence, lost all effect, and became as if they had never existed, and contracts based upon faith in them had no legal foundation whatever, and were entitled to no protection from any tribunal. The duty of the Federal court, assuming it not to be bound by the decision of the Iowa court, would then have been to examine the question on its merits and to deliver an independent judgment on the validity of the statute relied upon. This, however, is precisely what the court did *not* do. It gave no consideration to the relative merits of the contradictory Iowa decisions, but announced that the earlier cases would be followed because they had induced contracts in good faith. "However," said the opinion, "we may regard the late case in Iowa as affecting the future, it can have no effect upon the past." This is language for a statute, not for a judicial decision, which, according to the doctrine of *Swift v. Tyson*, declares not only what the law is and shall be, but what it was. Indeed, so far as the opinion is to be regarded as evidence, the judges in the majority, if they were not consciously exceeding their lawful authority,<sup>2</sup> acted under the impression that they were exercising the jurisdiction given to them by the Constitution to protect contracts. "The rule of *Ohio Life and Trust Co. v. Debolt*," it is said, "embraces this case." The principle of that case "applies where there is a change of judicial decision as to the constitutional power of the Legislature to enact the law. . . . To hold otherwise would be as unjust as to hold

<sup>1</sup> The rule of *Gelpcke v. Dubuque* has been often affirmed. *Green County v. Conners*, 109 U. S. 105; *County of Ralls v. Douglass*, 105 U. S. 728, 732; *Olcott v. Supervisors*, 16 Wall. 678; *Taylor v. Ypsilanti*, 105 U. S. 60, 71; *Cooley's Const. Lims.* 474, 477 (4th ed.); *Dillon's Mun. Corp.* § 46.

<sup>2</sup> "It is the settled rule of this court in such cases to follow the decisions of the State courts. But there have been heretofore in the judicial history of this court, as doubtless there will be hereafter, many exceptional cases." 1 Wallace, 206.

that rights acquired under a statute may be lost by its repeal." This conclusion is strengthened by the expressions of the court in cases expressly based upon *Gelpcke v. Dubuque*. In *Township of Pine Grove v. Talcott*,<sup>1</sup> for example, the court said:—

"The national Constitution forbids the State to pass laws impairing the obligation of contracts. In cases properly brought before us that end can be accomplished unwarrantably no more by judicial decisions than by legislation."

So, too, in *Douglass v. County of Pike*,<sup>2</sup> Chief Justice Waite said:—

"The new decisions would be binding in all respects as to all issues of bonds after they were made; but we cannot give them a retroactive effect without impairing the obligations of contracts long before entered into. This we feel ourselves prohibited by the Constitution of the United States from doing. . . . The true rule is, to give a change of judicial construction in respect to a statute the same operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective but not retroactive."

Upon this ground, that it presented a Federal question of the impairment of the obligation of a contract, some writers have supported the case. Mr. Conrad Reno<sup>3</sup> and Mr. William B. Hornblower<sup>4</sup> both appear to regard this as the true and sufficient basis of the decision, and in this opinion they are in evident accord, as has been shown, with the judges who made it. That an extension of the Federal jurisdiction to the protection of contracts from judge-made law as well as from statutes, would be legislation in the interest of justice and fair dealing, is readily admitted; but the great obstacle in the way of supporting the decision on this view is that the Iowa decision, which, it is claimed, impaired the obligation of a contract, was not in any proper sense before the court. The writ of error was directed to the United States District Court, not to the Supreme Court of Iowa. The litigation in the former court was between *Gelpcke* and the city of *Dubuque*, in the latter between the State, on the relation of a domestic corporation, and the County of *Wapello*. The Supreme Court decision cannot therefore be regarded as a reversal of the decision of the Iowa

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<sup>1</sup> 19 Wall. 666.

<sup>2</sup> 101 U. S. 677.

<sup>3</sup> "Impairment of Contracts by Change of Judicial Opinion." 23 Am. Law Rev. 190.

<sup>4</sup> "Conflict between Federal and State Decisions." 14 Am. Law Rev. 211, 216.



court. Furthermore, if we examine the Constitution from the point of view of those who framed it, it is plain that in declaring "no State shall pass a law impairing the obligation of contracts," it could not have been intended to include the decision of a court under the term "law." The mischief at which the prohibition was aimed had not been felt in the courts, but in the legislatures.<sup>1</sup> The language of the clause, too, forbids such an interpretation. Even the most thorough-going disciple of Austin would hesitate to speak of a court's "passing" a law, and the statesmen and lawyers of a century ago were still under the spell of the fiction that all decisions are merely declaratory. A decisive test of this view is a writ of error directed to the Supreme Court of a State on the ground that its decision has impaired the obligation of a contract. According to Mr. Justice Swayne and the writers mentioned, such a writ should be supported, there being no distinction in the prohibition between legislative and judicial acts. Mr. Reno, indeed, cites cases<sup>2</sup> to show that such a writ has been sustained; but they will not bear investigation. In each of them it was a statute, as construed by the court, which was averred to violate the Constitution. The question of construction was not open to review, and the only question raised was whether the statute, bearing the meaning fixed by the Supreme Court of the State, was forbidden by the Constitution. The position of the Supreme Court with respect to the State decisions was this: —

We must take your law to be correctly interpreted by your own courts, and if, so interpreted, it impairs the obligation of a contract, it is our duty to set it aside. This is a very different thing from reversing a decision of the Supreme Court of a State, because it impairs the obligation of a contract. If in *Gelpcke v. Dubuque* the statute had threatened innocently acquired contract rights, the case would be analogous to those cited by Mr. Reno. Instead of this, the contract sued upon in that case had no other foundation but the statute. At the present time this question is no longer open, for in *New Orleans Waterworks Co. v. Louisiana Sugar Co.*,<sup>3</sup> the court has decided that such a writ of error will not lie. It is the unanimous opinion of the court, as delivered by Mr. Justice Gray, that: —

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<sup>1</sup> The Federalist, No. XLIV.

<sup>2</sup> *Life Ins. Co. v. Debolt*, 16 How. 416; *Boyd v. Alabama*, 94 U. S. 645; *Wright v. Nagle*, 101 U. S. 794; *Louisiana v. Pillsbury*, 105 U. S. 278, 294-295.

<sup>3</sup> 125 U. S. 18, 30.

"In order to come within the provision of the Constitution of the United States, which declares that no State shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by a law of the State. The prohibition is aimed at the legislative power of the State, and not at the decisions of its courts."<sup>1</sup>

Another writer has found means to support the decision without calling to his aid the supposed Federal question. Professor James B. Thayer has given his approval to the principle of *Gelpcke v. Dubuque* as "a rule of administration" to be followed by the Federal courts.<sup>2</sup> He points out that to require the Federal courts to follow the State decisions in every case would defeat the purpose of the jurisdiction, since, if the law of the State and Federal courts were the same in all cases without exception, the effect of prejudice against non-residents would be equally operative in both tribunals. That some rule of administration is necessary to attain the end of the jurisdiction may be conceded, as it appears to the writer, without accepting either his definition of the rule or his conception of the cases in which it should be applied. "If," he says, "the rule be understood in this sense only, that any contract which was held good at the time of making it by the highest court of the State, and *which came within a reasonable interpretation of the State constitution and law*, will be sustained in the United States courts, I think it is a sound one and should be upheld." The application of the rule he would confine to classes of cases where the State courts are likely to be under a local bias. But just here appears to be the real difficulty. Where a local bias has affected the decision of the State court, it is undoubtedly the duty of the Federal court to examine the issue independently of the State decision, to inquire, in effect, whether the law of the State has not been changed for the purposes of a particular case and to the prejudice of a citizen of another State. The object of the jurisdiction, it must be remembered, is to secure the same law for an alien that would be applied in the case of a citizen. But the rule announced in *Gelpcke v. Dubuque* ignores this object, and declares, as qualified by Pro-

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<sup>1</sup> Mr. Justice Miller had already formed this opinion before his dissent in *Gelpcke v. Dubuque*. In *Knox v. Exchange Bank*, 12 Wall. 379, 383, he said:—

"It must be the Constitution or statute of the State which impairs the obligation of a contract, or the case does not come within our jurisdiction." His opinion in *Railroad Co. v. Rock*, 4 Wall. 181, is to the same effect.

<sup>2</sup> *Gelpcke v. Dubuque*, 4 HARV. LAW REV. 311.

fessor Thayer, that, provided the ruling of the first decision is permissible or within reason, it will be followed, whether it be right or wrong.

This is more than the occasion calls for. Why there should be such a rule of law for contracts brought in this way before the Federal courts, more than for any other contracts, it is not easy to see. Professor Thayer's careful limitation of the rule to this peculiar jurisdiction seems a tacit admission that the rule cannot be defended as a principle of general jurisprudence. Why is such a principle any more applicable to the decisions of State courts than to those of the Supreme Court itself?

In *Hepburn v. Griswold*,<sup>1</sup> the court declared the Legal Tender Act invalid as applied to contracts made before its passage, and in *Knox v. Lee*<sup>2</sup> this decision was overruled and the Act was held constitutional. Is the latter decision to be held inapplicable to the case of a party who purchased a money obligation after the former had been rendered, and presumably upon the faith of it? To answer affirmatively illustrates the danger of introducing the practice of considering prior decisions otherwise than upon their merits, and the confusion in the law which would result were such decisions to be judged according to the positions assumed by parties in reliance upon them. The burden of showing the necessity of such a practice in the jurisdiction now under examination rests upon him who affirms it.

In overruling *Hepburn v. Griswold*, the court exercised a power which in *Gelpcke v. Dubuque* it denied to the Supreme Court of Iowa. Why should a retroactive decision to the prejudice of contracts made on the faith of a prior decision be bad in the one case and good in the other? The Supreme Court itself would doubtless repudiate the suggestion that the rule is one of general application in contract cases. How does the object of the Federal courts' jurisdiction in cases where the parties are citizens of different States require such a rule? Has it any connection with that jurisdiction unless the constitutional prohibition is invoked and the analogy of a retroactive legislative act is applied?

Inasmuch as the general rule is confessedly to follow the last State decision, it would seem that, without the suggestion of any principle to distinguish the cases affected by local prejudice, the argument which makes such a course exceptional is fairly open to

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<sup>1</sup> 8 Wall. 603.

<sup>2</sup> 12 Wall. 457.



suspicion. Granting that the case is one to which the general rule is not applicable, what need is there for any rule of administration beyond those provided by the principles of law which the facts involve? The necessity for a special rule of administration extends only to a demarcation of the cases in which the last State decision should not be followed, and the inquiry properly should be, not whether the first and overruled decision is permissible, but whether the last decision, changing the law, can reasonably be upheld. If not, a fair presumption is afforded that the law was made for the particular case and to the special prejudice of an alien. In such a case the Federal court may well say: To follow this decision would defeat the end of our jurisdiction, and we refuse to do so. The question of permissible interpretation, the writer suggests with all deference, appears to be misplaced, and should be directed not to the decision in view of which the contract was made, but to the decision overruling it. The Supreme Court of a State has the undoubted right to overrule its own decisions, that is, to change the law of the State; and except in the one case of a decision against an alien so palpably contrary to reason as to afford a presumption that the court was influenced by local prejudice, it is the duty of the Federal court in applying the law of the State to follow the State court and to acquiesce in the change. Such a rule would introduce no new and hitherto unsuspected principle into the law of contracts, and would abundantly answer the purpose of the jurisdiction.

The object of discussing these different views of the case has been to show that the decision in *Gelpcke v. Dubuque* cannot be supported without an appeal to the now discredited Federal question. This appeal the judges who decided that case had no hesitation in making, and, having made it, they declared that the decision of a court of final resort was the law,—was, in fact, precisely equivalent to a statute, and fell equally within the constitutional prohibition.

The result of comparing these famous cases in their bearing upon the extent of legislative power to be attributed to the decisions of courts, if the above reasoning is not unsound, is to perplex the student with an unavoidable, though unintentional, contradiction in the decisions of the Supreme Court. The many decisions upon the authority of *Swift v. Tyson* declare that the decisions of courts of justice do not make the law, whereas the cases that follow *Gelpcke v. Dubuque* as confidently assert the con-

trary. Not the least curious feature of this inconsistency is that it should be illustrated in cases in which the court enlarged its own jurisdiction by decisions having all the legislative quality and more than the potency of an Act of Congress. This usurpation of a jurisdiction not given by the Constitution has been the subject of much comment. The conflict of opinion indicated upon the question of judicial legislation seems not less worthy the attention of those interested in the philosophy of our law and the study of its primary elements.

*William H. Rand, Jr.*

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HARVARD LAW SCHOOL ASSOCIATION. — The next annual meeting of the Harvard Law School Association, on the day before Commencement, promises to be a notable one in several respects. It marks the twenty-fifth year of Professor Langdell's service as Dean of the school, — a period full of meaning for all students of legal education, — and it is expected that the spirit of the occasion will find a most worthy exponent in the person of Sir Frederick Pollock, the orator of the day. A formal acceptance has been received from that distinguished jurist, whose hearty sympathy with the aims and methods of the school has endeared him to all interested in her progress, and he has definitely announced that he will attend. Sir Frederick, no doubt, will be received by the association *en masse*, and with such an ovation as his eminent talents and great friendliness to the school and her cause demand.

LEXOW COMMITTEE. — Harsh comments have been passed upon the modes of procuring testimony which the Lexow Committee has employed. That quasi-judicial tribunal, it is asserted, in the course of its examination has departed from the most time-honored and cherished principles of our law of evidence, and has adopted in their stead that inquisitorial probing into the presumed guilty knowledge of the witness which obtains on the Continent, but has always been regarded with strong aversion by English-speaking peoples.

In this objection there is undoubted force; but it may well be questioned whether its truth involves as a *sequitur* the utter condemnation of the methods of examination which the committee has used. No danger to the bench is feared, — even the most severe critics do not anticipate that, — but, at the most, dread the possible use which may be made of this procedure in similar investigations, in New York, at least. Suppose, however, such labor crowned with a far-reaching success which might



not have been gained had the less searching common-law system been used, are the only adequate means to be rejected in order to be in strict accord with the spirit of our law? There certainly is some room for argument on either side, and it is, perhaps, worthy of serious consideration whether after all it might not be better, in political investigations of this nature, to use the Continental instead of the common-law mode, — the rule best calculated to benefit the public rather than that best fitted to protect the individual.

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**LEISY v. HARDIN AND PLUMLEY v. MASSACHUSETTS.** — Intoxicating liquor is regarded by the majorities which pass prohibition laws as something the open sale of which "may cheat the people into purchasing something which they do not intend to buy, and which is wholly different from what its condition and appearance import." At least prohibition tracts are full of men lured into rum-shops, buying there something of whose real nature they are ignorant. Yet according to the very last decision of the Supreme Court, Dec. 10, 1894, in the case of *Plumley v. Massachusetts* (15 Sup. Ct. Rep. 154), *Leisy v. Hardin* (135 U. S. 100), known as the "original package" decision, "does not justify the broad contention that a State is powerless to prevent the sale of articles manufactured in, or brought from another State and subjects of traffic or commerce, if their sale may cheat the people into purchasing something they do not intend to buy, and which is wholly different from what its condition and appearance import." Accordingly, a statute of Massachusetts which forbids the sale of oleomargarine in color resembling butter (and that even if vendor and purchaser know it to be oleomargarine, as a late Massachusetts decision shows) is upheld as constitutional. "The Constitution," says Mr. Justice Harlan, delivering the opinion of the court, "does not secure to any one the privilege of defrauding the public," and "it is within the power of a State to exclude from its markets any compound manufactured in another State . . . the sale of which may . . . cheat the general public into purchasing that which they may not intend to buy, and which is wholly different from what its condition and appearance import" (15 Sup. Ct. Rep. 158).

One is put by this decision rather into a quandary. Why is oleomargarine so bad and liquor so good? One can more easily see why free rum should be bad and free oleomargarine good, and if *Leisy v. Hardin* and *Plumley v. Massachusetts* are to stand together, it will indeed be hard to tell how the Supreme Court will treat the next article of interstate commerce which is excluded from some State. The more reasonable supposition is that the earlier case is overruled. "It is sufficient to say of *Leisy v. Hardin*," says Mr. Justice Harlan, "that it did not in form or substance present the particular question now under consideration." If this is not the polite distinguishing away which will entitle the next editor of Greenleaf's overruled cases to include *Leisy v. Hardin*, it is hard to say what *Plumley v. Massachusetts* decides, or upon what principle the Supreme Court intends to go.

Fuller, C. J., Field and Brewer, JJ., dissent, holding, as Fuller, C. J., neatly puts it, that "the concession destroys the rule by an unnecessary exception." It will be noticed that the dissenters are a majority of the five judges still on the bench who sat on the case of *Leisy v. Hardin*, and that the four latest additions to the bench are in the present majority which decides *Plumley v. Massachusetts*.

TWICE IN JEOPARDY. — If the newspaper accounts are correct, the Supreme Court of Connecticut has recently rendered a decision which will attract much attention. It is reported that in a criminal case (*State v. Lee*) the State has secured a new trial on appeal for error of law. In the court below the prisoner was acquitted of having caused the death of a patient by a criminal operation. By the decision of the Supreme Court he is subjected to a second trial without his consent. There is no reason to believe this decision unsound. The Fifth Amendment in the United States Constitution, providing that no person be "subject for the same offence to be twice put in jeopardy of life or limb" is now admitted to be a restriction on the Federal Government alone (108 Mass. 5; 7 Peters, 243; 20 How. 84). The Constitution of Connecticut contains nothing on the subject, so that a statute providing for a second jeopardy would be constitutional (Green Bag, vi. 373). Connecticut has a statute allowing the State an appeal for error of law in criminal cases (Gen. Stat. Conn., § 1637, being Conn. Stat. 1886, ch. 15). Several other States have similar statutes, but they are not construed to give the prosecution a new trial after acquittal. (Cf. McClain's Iowa Code, §§ 5921, 5924; Bish. New Crim. Law, 8th ed., I., § 1024.) That is, however, because of restrictions in the State Constitutions as to second prosecutions. In Maryland, where no such restriction is contained in the Constitution, the State has been allowed to secure on writ of error a reversal of a judgment given in favor of the defendant; and this, apparently, in the absence of statute (*State v. Buchanan*, 5 Har. & J. 317). In Connecticut there is no constitutional difficulty in the way, and there does not seem to be any very good reason why the plain words of the statute should not be given the meaning attached to them in *State v. Lee*. As a matter of justice, it is difficult to see why the State should not have a new trial if there has been error in the proceedings. Why the rule forbidding a second jeopardy should apply here, and not where the trial has been on a defective indictment, is not very plain as a question of abstract justice. That the law is as stated is probably not to be explained by the circumstance that new trials came into use after the rule as to a second jeopardy had become settled. The law would probably have been the same even had new trials been of ancient origin. For, until within a comparatively recent time, carrying a criminal case up has generally been regarded as simply a further means of defence. That was the Continental view also, to the establishment of which Carpzow contributed more, perhaps, than any one else. If such a view ever was justified on political grounds, or grounds of expediency, it hardly seems to be now. Has not the time come to put the State on the same footing as the prisoner with regard to all means of modifying or reversing a judgment and obtaining a new trial? That is the law generally on the Continent under the codes. Such a change might be made by statute in several of our States, where there is no jeopardy clause in the Constitution (Maryland, Massachusetts, Vermont, and Virginia, and perhaps others. Colorado already has a sufficient provision in her Constitution).

Although the decision in the principal case is to be supported by reason of the Connecticut statute, the court seems in one place to use language very general in application. It is suggested that the first jeopardy is not exhausted until all the means have been used to secure a new trial. That is not the settled practice, and such a view would not be likely to meet with general acceptance.



CONTRACTS IN RESTRAINT OF TRADE. — The case of *Thorsten Nordenfelt v. The Maxim Nordenfelt Co.* (1894, Ap. Cas. 535) comes in happy seasons to clear up the subject of contracts in restraint of trade, which the course of recent judicial opinion in England had left in a rather dubious condition. In *Rousillon v. Rousillon* (1880, 14 Ch. D. 351), Fry, J., said: "It is urged that over and above the rule that the contract shall be reasonable, there exists another rule, namely, that the contract shall be limited as to space. . . . I adhere to those authorities which refuse to recognize this latter rule." In *Davies v. Davies* (1887, 36 Ch. D. 359), the court went out of their way to discuss this point, though not involved in the decision of the case. Cotton, L. J., said the rule was that "if a covenant is in any way limited, either sufficiently as regards space, or sufficiently as regards time, then it will not be considered as an absolute restraint of trade, and then the question as to whether the limit is reasonable will come into consideration." But "the law does not allow an absolute covenant to give up trade." Fry, L. J., however, stuck to his old view, while Bowen, L. J., did not express a decided opinion either way. In *Badische Anilin und Soda Fabrik v. Schott, Segner, & Co.* (1892, 3 Ch. D. 447), the court showed its strong approval of the view advanced by Cotton, L. J., in *Davies v. Davies*.

In *Nordenfelt v. Nordenfelt Co.*, however, although the only point involved was whether a covenant not to engage in a certain occupation for twenty-five years was good, the Lords not only decided that it was, but also asserted that the only test was reasonableness, — *i. e.*, that the covenant should not exceed what the protection of the covenantee required. Lord Herschell says (p. 548): "I think that a covenant . . . must be valid where the full benefit of the purchase cannot be otherwise secured to the purchaser." Lord Ashbourne remarks (p. 558): "I do not regard the distinctions of any practical importance, because, as in the present case, the inquiry as to the validity of all covenants in restraint of trade must now ultimately turn upon whether they are reasonable, and whether they exceed what is necessary for the fair protection of the covenantees." This sentiment appears to have been that of most of the Lords, and may now, it would seem, be regarded as the settled law of England.

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SELF-DEFENCE. — *Stute v. Evans*, 28 S. W. R. 8 (Mo.), decides that one whose life has been threatened may arm himself and knowingly go into the vicinity of the threatening party; and that the mere fact that he does so in the expectation of being attacked will not deprive him of the right to take life in self-defence.

The decision seems a sound one. A man may surely go where legitimate business calls him, although he knows he is likely to be molested. The court says, however: "The fact that defendant expected an attack did not abate one jot or tittle his right to arm himself in his own proper defence, nor to go where he would, after thus arming himself." Might not the right to go where his enemy was, in such a case, be made dependent on whether some legitimate business called him there? It is said that the right to take life in self-defence is founded on necessity (Foster, C. L. 273). Is there any real necessity when the threatened party seeks out his enemy for the mere purpose of provoking by his presence an execution of the threat? The principle that a conflict for blood should, if possible, be avoided seems a humane and safe one, and



the text-books and cases are not without *dicta* in its support (1 Bish. New Crim. Law, § 869; *Com. v. Crum*, 58 Pa. 9; *Gilleland v. State*, 44 Tex. 356).

The following passage shows that some such idea was present to the minds of the old lawyers, and is of interest in this connection: "But if one were threatened that if he should come to such a market, or into such a place, he should there be beaten, in that case he could not assemble persons to help him go there in personal safety, for he need not go there, and he may have a remedy by surety of the peace" (Anon. Y. B. 21 Hen. VII. 39, pl. 50).

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COMPENSATION FOR IMPROVING ANOTHER'S PROPERTY WITHOUT REQUEST.—The Supreme Court of North Carolina, in *Gaskins v. Davis*, 20 S. E. R. 188, decides that one who cuts logs on another's land by mistake cannot, when they are retaken by the lawful owner, claim compensation for their increase in value caused by his having transported them to market. The action was by the lawful owner for damages for cutting other logs, and defendant sought to counter-claim.

Had the mistaken wrongdoer sufficiently changed the nature or enhanced the value of the logs to acquire title to them by accession, the measure of damages would have been limited to the value of the logs at the time of the conversion. The same rule would have applied in many jurisdictions if there had been no accession, and the real owner had brought trover for the logs instead of retaking them. In both cases defendant would, in effect, have been compensated for the increase in value which his labor had brought about. It seems unfortunate that in the single case where there has been no accession, and the logs are retaken by the owner, the right to compensation should be denied. In *Isle Royal Mining Co. v. Hertin*, 37 Mich. 332, a similar log case, the claim was denied because to allow it would be to offer a "premium to heedlessness and blunders." The rule of damages in accession and trover seems equally lenient to blunderers, and has not been found disastrous in practice.

It is rather difficult to distinguish the cases on principle from those in which a right to compensation in equity has been allowed for improvements to land made under a mistaken belief of ownership (*Albea v. Griffin*, 2 Dev. & B. Eq. 9 (N. C.); *Rodman, J.*, in *Potter v. Mardre*, 74 N. C. 40). A decision to much the same effect was made in *Bright v. Boyd*, 1 Story, 478; 2 Story, 608. And see Keener, Quasi-Contracts, 385, 386.

The analogy was noticed by the court in the principal case.

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COMPARATIVE NEGLIGENCE.—The REVIEW has received a letter from Mr. E. Parmalee Prentice, of Chicago, kindly calling attention to the fact that in the note on Comparative Negligence, in the January number, the future of that doctrine was suggested in a somewhat more cautious way than the situation requires. For this view he cites *Railway Co. v. Hession*, 37 N. E. R. 905-907; *City of Lanark v. Dougherty*, 38 N. E. R. 892; *Iron Co. v. Martin*, 115 Ill. 358; *Wenona Coal Co. v. Holmquist*, 38 N. E. R. 946, and adds that ever since the Martin case that rule has been regarded by the Chicago Bar as discredited. Whatever weight may be given to the earlier cases, the opinion of the local bar on this question,

and the cases of *Lanark v. Dougherty*, and *Coal Co. v. Holmquist* (above cited), reported since the writing of the note on this subject, are undoubtedly, as Mr. Prentice suggests, to be regarded as rendering the doctrine of Comparative Negligence obsolete and no longer law.

RICE *v.* D'ARVILLE AND JOHNSON *v.* GIRDWOOD AFFIRMED. — *Rice v. D'Arville*, 8 HARVARD LAW REVIEW, 172, has been affirmed by the Supreme Court of Massachusetts, which seems explicitly to deny, as Mr. Justice Holmes did below, the English case of *Lumley v. Wagner*, 1 De G. M. & G. 604. But the main ground of the decision, so far as the incomplete report at hand shows, is that the plaintiff was unable to do his part of the affirmative contract, and therefore not entitled to equitable relief in the negative branch. The decision above is then by no means so far-reaching as the principle laid down below.

*Johnson v. Girdwood*, 28 N. Y. Suppl. 151, commented on 8 HARVARD LAW REVIEW, 222 ("Can one cheated into pleading guilty maintain an action for it?"), had been affirmed in the Court of Appeal, without opinion or reasons for the decision, on October 9. It is to be regretted that the commendable zeal of that court to keep up with its docket should deprive the profession of discussion on a case of the first impression with such novel facts and raising so interesting a question.

## RECENT CASES.

AGENCY — EMPLOYER'S STATUTORY LIABILITY — WAYS, WORKS, AND MACHINERY. — *Held*, that loaded freight cars received by a railroad company from and belonging to another road, are part of "the ways, works, and machinery" of the railroad, within the meaning of a statute similar to the English Employer's Liability Act. *Bowers v. Connecticut River R. R. Co.*, 38 N. E. Rep. 508 (Mass.).

While this case turns upon the construction of a statute, yet it is interesting because of the prevalence of statutes of this kind. A different construction was given the statute on facts which are hardly distinguishable in *Coffee v. R. R. Co.*, 155 Mass. 21, where it was held that empty cars belonging to another company and being returned to that company by the defendant, were not part of "the ways, works, and machinery" of the defendant. The point is now settled in Massachusetts in accordance with the principal case by St. 1893, c. 359, which expressly provides that any car in the use of, or in the possession of a railroad company, shall be considered a part of its ways, works and machinery.

AGENCY — PAROL AUTHORITY. — A Statute of Illinois provides that city councils should allow street railroads to be built only when the land-owners petition for such railroad. There was a petition in this case and the city council granted permission to the defendant railway company to build a line. Plaintiff now seeks to enjoin the building of it on the ground that the names of some of the land-owners were signed by agents, as appears on the face of the petition, and that the authority does not appear. The theory was that the authority had to be in writing. *Held*, a parol authority to sign was good, and injunction will not be granted. *Tibbets v. West and South Towns St. Ry. Co.*, 38 N. E. Rep. 664 (Ill.).

In Illinois an authority to sell or lease lands must be in writing, and the argument of the counsel for plaintiff was that practically land was sold here so the petition could be signed only by the owner, or an agent authorized by writing. The court answered that "there was nothing in the statute changing the common-law rule by which an agent may sign the name of his principal to a writing, under an authority not in writing." They said the fee of the street belonged to the city of Chicago, and that the petitions did not operate as a grant anyway.

AGENCY — RATIFICATION BY PRINCIPAL NON-EXISTING AT DATE OF CONTRACT. — One of the promoters of defendant corporation contracted with plaintiff on behalf of



defendant, to pay plaintiff \$1,000 00 for services to be rendered the corporation. The contract was entered into before the corporation had come into existence. The promoter afterwards became president of the corporation and ratified the contract, it being within the scope of his authority to make or ratify contracts of this nature. *Held*, that such ratification made the contract binding upon defendant, Gray and Fitch, JJ., dissenting. *Oakes v. Cattaraugus Water Co.*, 38 N. E. Rep. 461 (N. Y.).

This decision entirely disregards the established rule of law that acts done on behalf of a non-existing principal cannot afterwards be ratified by that principal. The minority, however, stand by the doctrine. Technically, the established rule cannot be gainsaid, for the ratification relating back to the time when there was no principal, seems an absurdity. But practically it has often been necessary for the courts to look behind the corporation and at the stockholders, and it would not require such a very great stretch to do so in this case. The body of men who form the corporation are in existence at the date of the contract, and are acting in order to bind themselves, only under another name, that is, the name of the corporation. Is it not better then to say that the court in a case of this kind will look behind the corporate entity and at the real principals, thus avoiding technical rules, effectuating the intention of the parties, and bringing about more substantial justice? See 1 Morawetz Private Corporations, §§ 547-549.

**BILLS AND NOTES — PROMISSORY NOTE — GARNISHMENT.** — The maker of a note agreed to pay a certain commission if the note was not paid at maturity and was collected by an attorney. The maker was garnished in an action against the payee, and while the garnishment was still pending, the note fell due. Immediately after the maker's discharge, consequent upon the dismissal of the suit against the payee, he paid the principal and interest. *Held*, that these facts were no defence in this action to recover the commission for non-payment of the note at maturity. *Brahan v. The First Nat. Bank of Clarksville*, 16 So. Rep. 203 (Miss.).

It is settled in Mississippi by the cases of *Work v. Glaskins*, 33 Miss. 539, and *Smith v. Bank*, 60 Miss. 69, that a garnishee is liable for interest accruing *pendente lite*, and that to avoid such liability he must pay the money into court. The court decide this case on the same principle, and hold that, if defendant wished to escape liability for these commissions, he should have paid the notes, as they fell due, into court, suggesting the fact of their negotiation, if known to him.

**CARRIERS — RIGHT TO STOP-OVER PRIVILEGES ON AN UNLIMITED TICKET.** — Plaintiff purchased an unlimited ticket from S. to A., and upon giving it up, demanded from the conductor a stop-over check, as he wished to leave the train at O., an intermediate station. This was refused him, but he alighted at O., and resuming his journey on the same day by a subsequent train, was ejected for refusal to pay his fare. *Held*, under § 490 of the civil code of California, allowing the purchaser of a railway ticket to ride from the station at which the ticket was bought to the station of destination, "and from any intermediate station to the station of destination," the plaintiff has a right to stop off at any intermediate station, and resume his journey, without payment of additional fare. *Robinson v. S. P. Ry.*, 38 Pac. Rep. 94 (Cal.).

It is perfectly well settled that by the common law the purchaser of a railway ticket has no such privilege as is allowed by the decision in this case. Whatever rights a ticket confers are exhausted when the passenger is received on the train. His ticket is used as soon as the train starts, and may be thereafter demanded and cancelled. *Auerbach v. Ry.*, 89 N. Y. 281; *Evans v. Ry.*, 11 Mo. Ap. 463. The performance on the part of the railway to which the passenger is entitled is a unity, and an unbroken series of authorities deny his right to force upon it the burden of carrying him from place to place between intermediate stations on a single ticket covering the whole distance travelled. *Cheney v. Ry.*, 11 Met. 121; *Vankirk v. Ry.*, 76 Pa. St. 66; *Wyman v. Ry.*, 34 Minn. 210; *Roberts v. Koehler*, 30 Fed. Rep. 94; *Cody v. Ry.*, 4 Sawy. 114.

It would seem that if the legislature of California had intended to make such a sweeping change as is involved in endowing all tickets with stop-over privileges they would have used more explicit language. Such, however, under the decision of the court is the effect of the section in question whatever the intention may have been when it was enacted.

**CONSTITUTIONAL LAW — DESCENT AND DISTRIBUTION — COLLATERAL INHERITANCE TAX.** — While the tax imposed by St. 1891, c. 425, on inheritances, is in form a tax on property, in effect it is an excise on the privilege of transmitting property in this way. This privilege is a taxable commodity within the meaning of the Constitution, and an excise laid upon it is not unreasonable and void, because certain estates are exempt, nor because kindred in the direct line are relieved from payment. *Minot et al. v. Winthrop et al.*, 38 N. E. Rep. 512 (Mass.). See Notes HARVARD LAW REVIEW, Vol. VIII. p. 226.



**CONSTITUTIONAL LAW — INTERSTATE COMMERCE — PRIVILEGES AND IMMUNITIES.** — To protect the people of the State from false representations, a Statute of Minnesota required every vendor of nursery stocks, grown outside the State, to file an affidavit, give bond, and comply with other restrictive regulations, none of which were imposed on the vendors of similar stock grown in the State. *Held*, — such restrictions upon the sale of a sound foreign product interfere with the power of Congress to regulate interstate commerce (art. 1, § 8, cl. 3), and deprives the dealer of his privileges and immunities under art. 4, § 2 of the Constitution. *In re Schechter*, 63 Fed. Rep. 695.

In holding the statute unconstitutional on the first ground, the court is simply following *Welton v. Missouri*, 91 U. S. 275, and *Cook v. Pennsylvania*, 97 U. S. 566, and earlier cases to the effect that the power of Congress over the transportation of a commodity continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character; but the second ground of the decision may be questioned, as the statute apparently made no discrimination between the citizens of Minnesota and those of other States, and the only explanation would seem to be that the court believed its position would be justified by the practical effect of such legislation.

**CONSTITUTIONAL LAW — OBJECTS OF TAXATION — JUDICIAL QUESTION.** — In satisfaction of a claim by the relator against a township for a certain sum paid over to his successor in office by mistake, the legislature enacted that the respondent should levy upon the taxable property in said township for the purpose of refunding the said sum with interest. In error, upon the award of a writ of mandamus to compel the levy, it was *held* that the enactment was constitutional if supported by a sufficient moral or legal obligation; but when the facts out of which such obligation is claimed to arise, are disputed, the controversy falls within the province of the court. *Board of Education v. State ex rel. Lindsay*, 38 N. E. Rep. 614 (Oh.).

The limitations which the court here places upon the power of the legislature to bind a party against whom it has allowed a claim, and the tests here adopted, are recognized as established principles. (Cooley's Con. Lim. 6th ed. pp. 286, 599; 25 Am. & Eng. Ency. 89, 90.) Yet the court will view the action of the legislature in as favorable light as possible, and be slow to declare that that body has passed the boundary of its power, unless the absence of all possible grounds is clear and palpable.

**CONTRACTS — JOINT VENTURE IN PURCHASE AND SALE OF LANDS — ACTION FOR PROFITS ON REFUSAL TO SELL.** — Plaintiff entered into a contract with defendants in June, 1882, to purchase timber-lands for them. He was to receive for his services a certain percentage of the profits arising from the sale of the lands, after deducting the amount of the taxes and interest. The defendants expressly reserved the right of determining the time and terms of the sale. Plaintiff purchased accordingly. In August, 1883, defendants refused an offer for the lands which would have netted them a return of 300 per cent. Plaintiff demanded his share of the profits based upon such offer, but was refused, and action was brought, the verdict being in his favor. On error, Knowles, J., *held* that, notwithstanding the express reservation, the contract was not to be so construed as to leave it to the option of the defendants whether or not a sale should ever take place. In such contract as the present, the law requires that a reasonable time for the sale be fixed, and that a reasonable price be decided upon. If the party having the discretion fails to conform to these requirements, he becomes liable. *Nunes v. Dautel*, 19 Wall. 560, which cites *Hicks v. Shouse*, 17 B. Mon. 487; and *Ubsdell v. Cunningham*, 22 Mo. 124. The learned judge seemed to think that the price offered had been admitted to be the market value of the land, thus fixing the measure of plaintiff's damages as there was no question but that a reasonable time for making the sale had elapsed. He was for affirming the judgment. Gilbert, J. (dissenting), thought that the defendants were under no obligation to accept the offer. He admitted that the plaintiff might bring action if the lands remained unsold after a reasonable time, or if the profits had been ascertained as by accounting or admission, but thought that nothing of the kind had occurred. The two members of the court differing, the verdict stood. The learned judges seem to differ rather as to the construction to be placed upon the facts than in their views of the principle involved. *Noyes v. Barnard*, 63 Fed. Rep. 782.

**CONTRACTS — RESTRAINT OF TRADE — UNLIMITED AS TO SPACE.** — A patentee and manufacturer of guns and ammunition for purposes of war covenanted with a company to which his patents and business had been transferred that he would not for twenty-five years engage, either directly or indirectly, in the business of a manufacturer of guns or ammunition. *Held*, the covenant is not one in restraint of trade, and will be enforced by injunction. *Nordenfelt v. Maxim-Nordenfelt Co.*, L. R. [1894] 5 App. Cas. 535.

The English law has been steadily tending of late years toward the abandonment of the old rule that every covenant not to engage in a particular trade was void if unlimited as to space. Pollock on Contracts, p. 315. This case definitely discards the old rule, and lays down as the test of validity: What is a reasonable restraint with reference to the particular case? The opinions of the judges are interesting because they show clearly the gradual development of the law as to such contracts, and the steadily increasing tendency toward the result now finally determined upon by the House of Lords. See NOTES.

CORPORATIONS.—ULTRA VIRES ACTS.—*Held*, that the alienation by a corporation of a pipe-line in which a great part of its capital was invested, and the possession of which was necessary for the carrying on of its business, was *ultra vires*, and might be restrained at the suit of a single stockholder. *Carter v. Producers' & Refiners' Oil Co.*, 30 Atl. Rep. 391 (Pa.).

The above decision would seem to be correct. It has always been held that alienation by a railroad company of its road-bed is *ultra vires*, and the present case is in line with that.

CRIMINAL LAW — EXTRADITION — CONVICTION OF CRIME NOT SPECIFIED.—*Held*, under the treaty between the United States and Great Britain, which provides for the extradition of persons "charged with the crime of murder or assault with intent to commit murder," a person extradited on the charge of "assault with intent to commit murder" cannot be convicted of an assault with intent to do great bodily harm. *People ex rel. Young v. Stout*, 30 N. Y. Supp. 898.

It was urged that a man could be extradited for one offence and convicted of another minor offence included within the one for which he was extradited. In this case, however, the prisoner could not have been extradited at all for the minor offence of assault with intent to commit great bodily harm. The court say that to allow a conviction for the minor offence under these circumstances would be a breach of faith and a violation of the treaty between Great Britain and the United States by which extradition for the major offence was made possible. The precise question raised here is thought to be rather a novel one.

CRIMINAL LAW — HOMICIDE — INSANITY — IRRESISTIBLE IMPULSE.—Instructions *held* correct, that if defendant, by reason of insanity, was rendered incapable of distinguishing right from wrong as applied to his act, or if by reason of an insane delusion he was deprived of his will-power, and was compelled by an irresistible impulse to do the act, then he is excused. *Wilcox v. State*, 28 S. W. Rep. 312 (Tenn.).

This, it is submitted, is the correct view. *Parsons v. State*, 81 Ala. 577. The decisions in this country are in conflict as to whether an irresistible impulse will excuse from crime, when defendant knew the difference between right and wrong. Beale's Cases on Criminal Law, 254, Note on the Test of Insanity. But if the impulse was really irresistible, and was caused by a diseased state of mind, there seems to be no good reason why defendant should be held responsible, even though he knew right from wrong, when he was unable to choose between right and wrong. See, *contra*, 2 HARVARD LAW REVIEW, 387.

CRIMINAL LAW — HOMICIDE — SELF-DEFENCE.—The defendant, knowing that his life had been threatened, armed himself and went where deceased was. *Held*, that although he went in the expectation of being attacked, he was not deprived of the right to kill in self-defence. *State v. Evans*, 28 S. W. Rep. 8 (Mo.). See NOTES.

CRIMINAL LAW — LIBEL — RESPONSIBILITY OF A NEWSPAPER PUBLISHER.—In a prosecution for libel against the publisher of a newspaper, *held*, that it is no defence for the publisher to show that the article was published in his paper without his consent and knowledge, unless it further appears that the publication did not occur through any negligence or want of ordinary care on his part. *State v. Mason*, 38 Pac. 138 (Ore.).

The publisher gives his agents the power to publish articles, and if through his want of care such articles are published, he should be held criminally liable. *Mechem on Agency*, § 746. The case follows *Commonwealth v. Morgan*, 107 Mass. 199; and is law in England by Statute 6 and 7 Vict. c. 96. The English law, before the statute, was even more severe. *Rex v. Gutch*, 1 Moody and M. 433. See, also, 3 Albany Law Journal, 46; 64 Law Times, 95.

EVIDENCE — JUDICIAL NOTICE.—Testimony was given that a crime was committed in Moniteau County, three miles from California. *Held*, this is evidence that the crime was committed in Missouri, for the court will take judicial notice that Moniteau County is one of the counties of Missouri, and that California is a town in Moniteau County. *State v. Pennington*, 27 S. W. Rep. 1106 (Mo.).

In this country, if a place is situated within a given jurisdiction, the court of that



jurisdiction has invariably taken judicial notice of the fact. *Commonwealth v. Desmond*, 103 Mass. 445; *Solyer v. Romanet*, 52 Tex. 562; *Smitha v. Flournoy's Adm'r*, 47 Ala. 345 at 367; *Ala. Gold Life Ins. Co. v. Cobb*, 57 Ala. 457. But where the place is not within their jurisdiction, the courts have declined to take judicial notice that the place referred to is one place of the name rather than another. *Andrews v. Hoxie*, 5 Tex. 171; *Riggin v. Collier*, 6 Mo. 568. These latter two cases follow the English case of *Kearney v. King*, 2 B. & Ald. 301. See also *Brune v. Thompson*, 2 Q. B. 789. In *Kearney v. King*, *supra*, it was held that the court could not take judicial notice that a bill headed "Dublin, May 1, 1816," was drawn in Dublin, Ireland, because there may be other Dublins in the world. The same reason might be applied where the place in question is within the jurisdiction of the court, but as the subject of judicial notice is not at all technical, and as it lies within the discretion of the court to take it or not, and as it is not final if a party gives evidence that some other place is meant, there is ample justification for the above distinction. Of course the courts will more readily take judicial notice that a certain place is meant, if there are other circumstances indicating that fact, as there usually are when the place is within their own jurisdiction.

**PARTNERSHIP — ATTACHMENT AND SERVICE.** — A partnership having a usual place of business in Ohio, and formed for the purpose of carrying on business there, consisted entirely of non-resident partners. In an action against it: *Held* (a), that since the partnership as such had no separate existence, its property could be attached as that of the partners, under the Ohio law allowing attachment of the property of non-residents; (b) that a writ made out in the firm name, served on the firm as such at its usual place of business, was good. *Byers v. Schlupe*, 38 N. E. Rep. 117 (Ohio).

It would seem that the general reasons for allowing more stringent process against non-residents do not apply to a firm doing business within the State, having all its assets there, and, as the second holding shows, fully amenable to service.

The second holding is based upon § 5011 Rev. Stat. of Ohio, which provides that "a partnership may sue or be sued by the ordinary name which it has assumed; and in such case it shall not be necessary to allege or prove the names of the individual members thereof." The statute is so complete a recognition by the legislature of the separate existence of the firm that it jars unpleasantly with the refusal of the court to recognize anything of the sort.

**PARTNERSHIP — INFANCY OF PARTNER — JUDGMENT AGAINST FIRM.** — *Held*, that in a suit against a firm, of which one of the partners was an infant, judgment should be rendered against the firm "other than the infant" and that bankruptcy proceedings should also be taken against the firm "other than the infant." *Lovell and Christmas v. Beauchamp*, L. R. [1894] 5 App. Cas. 607.

This case treats the partnership as an entity to a certain extent, and gives judgment against it as such, thus making the firm assets pay the firm debts, though one of the partners is an infant. This is reaching the right result in the right way. In contrast with this case is *Whittimore v. Elliott*, 7 Hun, 518. There the right result was reached in the wrong way. Judgment was rendered against the adult members of the firm only, but execution was allowed to be taken out on all the firm property. To prevent great injustice, the common law had to give way somewhere, and the court, rather than discard the common-law theory of a partnership, allowed execution to be taken out which did not follow the judgment, but was against the property of those against whom no judgment had been rendered. The result in the principal case was made possible by the English statute allowing partnerships to sue and be sued in the firm name, and this now seems the only way to get rid of the common-law notion of a partnership and make it, what it is really treated as being by merchants and partners themselves, a legal entity.

**PERSONS — BREACH OF PROMISE — FRAUD.** — As a defence to an action for breach of promise, evidence was given that plaintiff had told defendant that she had obtained a divorce from her former husband, but did not mention the fact that he also had obtained a divorce from her on the ground that she had a violent temper and had treated him with such cruelty that his health had been injured. She told defendant, also, that she was a descendant of the finest white families in Charleston, but omitted to state that her mother married a colored barber about the death of her first husband, and that this negro was her reputed father. *Held*, that these facts constituted a good defence. *Van Houten v. Morse*, 38 N. E. Rep. 705 (Mass.).

The court expressly says that it is not the duty of a woman, before accepting an offer of marriage, to tell all the history of her family and herself, but decides the case on the ground that it was fraud for her to narrate part of such history and suppress the rest, so that plaintiff was deceived as to the kind of woman he was promising to marry.



The agreement to marry differs very often from other contracts in that it looks to the creation of a status; so, in many instances, the ordinary rules of contracts cannot be applied. Whenever it is possible to apply them, however, without doing great injustice, they should be; and in this case we find such an application to a state of facts rather novel. Mr. Bishop, in his *Marriage, Divorce, and Separation*, Vol. II. § 224, says: "Any conduct by one of the parties amounting to actual fraud will justify the other, who has been entrapped by it, in withdrawing from the agreement." This general proposition, when applied to the facts of this case, would seem to justify plaintiff in refusing to perform his contract, as a partial statement of facts is often as deceptive as a misstatement.

PERSONS—DIVORCE—COLLUSION.—The respondent and co-respondent committed adultery without the connivance of the husband. The wife had some property, and the petitioner desired to have this settled on their child after the life of the respondent. He therefore agreed to bring suit for divorce, and ask for no damages if the wife would so settle the money. The wife also deposited £100 to pay the costs of petitioner. As a result of this agreement, the suit was begun, and a decree *nisi* obtained. The Queen's Proctor here intervenes on the ground of collusion. In his opinion the learned President of the Probate, &c., Division says, "there was no collusion to present to the court false facts in proof of adultery;" and "it was not shown that there were any specific facts material to defence or recrimination which might have been brought forward by the wife." The question, therefore, came squarely before the court whether collusion means an agreement to deceive the court by putting in false matter, or suppressing material matter, or whether an agreement merely as to the prosecution of the suit and costs was collusion. The court held that collusion is to have the broader meaning, and that there was collusion in this case. So the Queen's Proctor was entitled to succeed. *Churchward v. Churchward and Holliday*, 11 *The Times Law Rep.* 69.

The English authorities are very carefully dealt with by Sir Francis Jeune, who comes to the conclusion that there are two or three cases in point. *Lloyd v. Lloyd*, 1 Swab. & T. 567, is very like the present case,—the only difference being that there an agreement as to the procurement of evidence existed. In the principal case the matter is discussed on theory very ably. The learned President says: "He [petitioner] appears before the court in the character of an injured husband asking relief from an intolerable wrong; but if, at the same time, he is subjecting his rights to pecuniary stipulation, he raises more than a doubt whether, in the words of Lord Stowell, he has received a real injury and *bona fide* seeks relief.

Mr. Bishop arrives at the same result. 2 Bish. Mar. and Div. § 28, a.

PERSONS—USE OF WIFE'S SEPARATE ESTATE—LIABILITY OF HUSBAND.—Where a wife allowed her husband to take legacies to her separate use and spend them in the support of the family, without any understanding whether they were a gift or a loan, held, that she might recover the amount taken. Owing to the peculiar relation of husband and wife the inference arising from a transfer of her separate property to him is that a trust was intended. The onus is on the party wishing to prove a gift. *Hammond v. Bledsoe*, 38 N. E. Rep. 530 (Ind.).

The court distinguishes between a use of the principal and of the income of the separate estate, saying that in the latter case the court will presume a gift. This distinction runs through the books, appearing at least as early as 2 P. Wms. 82. The reason for it seems to be that originally the principal of the separate estate was in the hands of a trustee, who might be the husband, and he might dispose of the property without his wife's knowledge, so that it would have been unjust to presume that she consented; as to the income, however, she knew when it became due, and if she quietly allowed her husband to keep it, her consent might fairly be presumed. The reason for this distinction is past. A married woman may hold property at law; as in the principal case she may take actual possession of it; if after that she hand any of it over to her husband, whether principal or interest, may not the courts fairly presume that she intended to make a gift?

PROPERTY—EQUITY—CANCELLATION OF A DEED.—Where a grantor delivers a deed to the grantee without consideration, on the understanding that no title is to pass until certain security is given in return. Held, there is no valid delivery of the deed, and the grantor may obtain cancellation of the deed at any time before such security is given. *Rountree v. Smith*, 38 N. E. Rep. 680 (Ill.).

The fundamental assumption upon which this case is decided is erroneous, if the decision is correctly reported. The exact words of the decree are not given, but the idea of a conditional delivery in escrow to a grantee is opposed to the whole spirit of the law. The authorities upon which the Illinois court rely for this peculiar decision

are all to the effect that delivery is necessary to the validity of a deed; from which premise they conclude that there may be a delivery conditioned on the return of security; that as this was not done the title never passed from the grantor. Hence the deeds were merely a cloud on the title, and should properly be cancelled by decree of a court of equity. There is undoubtedly a remedy by decree in such a juncture; but it is not found in assimilating the procedure where real property is involved to that in vogue in cases of written contracts. These may be delivered up and cancelled. But it would seem that the proper decree in the principal case would be to reconvey, or that the grantee furnish such security as had been agreed between the parties.

**PROPERTY—EXCEPTION IN GRANT—FUTURE ESTATE.**—W. H. M. conveyed lands to one H. The deed contained the following clause: "Reserving unto said W. H. M. and E. M. M. a life lease of said above-described premises, for and during the life of each of them." The question was what interest E. M. M. (plaintiff), who was the daughter of W. H., acquired by this clause, she being a stranger to the deed. *Held*, a "reservation" in favor of a stranger to the instrument is invalid as a reservation, yet in order to effectuate the intention of the grantor such a reservation has uniformly been treated as "excepting" from the grant the thing reserved. The language here used must be treated as excepting from the grant the use, &c. of the land conveyed during the lives of both father and daughter, and at the death of the father the right to that use for the unexpired portion of the period must be held to have descended to the heirs of W. H. M., of whom the petitioner is one. *Martin v. Cook*, 60 N. W. Rep. 679 (Mich.).

The purpose of the clause in this deed is clearly to create a future estate in fee. That such estate could not be created by a common-law conveyance is of course clear, on account of the impossibility of livery of seisin. This difficulty, however, may be overcome by treating this conveyance as a bargain and sale executed by the Statute of Uses (2 How. Ann. Stat. chap. 214, § 5565), inasmuch as there appears to have been a consideration paid sufficient to raise a use. A good case on this point is *Rogers v. Eagle Fire Company*, 9 Wend. 611. The court in the principal case do not discuss this point at all, though it seems the only ground on which the desired result can be attained. The court devote most of the opinion to deciding that technical words of reservation will not prevent the clause from being treated as an exception if such appears to have been the intention of the parties. It would seem that this is perfectly settled on principle and authority. In support of the proposition that this has not been confined to cases where the reservation had been previously carved out, the court cite several cases of such exceptions; they refer mostly, however, to personalty, and for this reason do not seem precisely in point, as there is no difficulty about creating future estates in personal property. The decision is sound, but should be supported on the grounds suggested.

**PROPERTY—JOINT POWER OF APPOINTMENT—REVOCATION BY SURVIVOR.**—By a marriage settlement, funds were settled upon trust for the children of the marriage in such shares and in such manner as the husband and wife during their joint lives by deed, with or without power of revocation and new appointment, should appoint; and in default of and subject to such joint appointment, then as the survivor of them should by deed, with or without power of revocation and new appointment, or by will appoint. The husband and wife made a joint appointment, with a proviso that the appointment thereby made was made "subject to the power of revocation and new appointment mentioned in the settlement." After the death of the wife, the husband executed a deed revoking the joint appointment, and making a new appointment of the fund. *Held*, that the husband and wife had power in their joint appointment to reserve a power of revocation and new appointment to the survivor, and that such power was effectually reserved in the joint appointment. *In Re Harding*, L. R. [1894] 3 Ch. D. 315.

This is a question of construction, and the court follow the rule laid down by Lord Kenyon in *Brudenell v. Elwes*, 1 East, 442. Lord St. Leonards states it as follows: "If a particular power is given to two persons or the survivor of them, with or without power of revocation, they may execute a joint appointment and reserve a power to the survivor to revoke and appoint again. The argument against the validity of the power of revocation to the survivor was, that the original power did not authorize a joint appointment to be defeated by any but a joint revocation. But the joint appointment is allowed to be superseded by the revocation of the survivor." Sugden on Powers, 8th ed., 364, § 6.

**PUBLIC SCHOOLS—SECTARIAN TEACHING.**—Bill in equity to restrain school directors from employing as teachers in the public schools nuns of the Sisterhood of St. Joseph, a religious society of the Roman Catholic Church, on the ground that their wearing the distinctive sectarian garb, crucifixes and rosaries of their order, during



school hours was sectarian teaching. *Held*, that in the absence of proof that religious sectarian instruction was imparted, or religious sectarian exercises engaged in, the "Sisters" cannot be restrained by injunction from teaching in the distinctive garb and insignia of their order, nor the school directors from employing them in that capacity. *Hyson et al. v. School District of Gallatin Borough et al.*, 30 Atl. Rep. 482 (Pa.), Williams, J., dissenting.

It is difficult to see how any other conclusion could have been reached in this case. "The dress," said Dean, J., "is but the announcement of a fact — that the wearer holds a particular religious belief." To have decided that it was more, and that as a matter of law it was sectarian "teaching," would have been the result of great refinement. The court was right in refusing to give that word a meaning wholly unusual and extraordinary. Reading from the Scriptures in the public schools has been considered in Maine, Massachusetts, Illinois, and Iowa as non-sectarian. 21 Am. & Eng. Ency., p. 775.

QUASI-CONTRACTS — RECOVERY FOR WORK DONE WITHOUT REQUEST. — The defendant by mistake cut logs on the plaintiff's land, and transported them to a place where there was a ready market. Plaintiff took possession, and brought an action for damages for cutting other logs. *Held*, that defendant could not set up a claim for the enhanced value of the logs transported. *Gaskins v. Davis*, 20 S. E. Rep. 188 (N. C.). See NOTES.

QUASI-CONTRACT — WILFUL BREACH OF CONTRACT — NO RECOVERY ON QUANTUM MERUIT. — Plaintiffs made an oral agreement with defendant, whereby plaintiffs agreed to furnish all the granite for defendant's house for \$10,000. After having furnished something over one-half of the necessary stone, they abandoned the contract, and now sue on *quantum meruit* for labor and materials. *Held*, that plaintiffs cannot recover. *Cohn et al. v. Plumer*, 60 N. W. Rep. 1,000 (Wis.).

The decision in this case is in conformity with the great weight of authority. In England, *Collins v. Stimpson*, 11 Q. B. Div. 142, in Massachusetts, *Hatgood v. Shaw*, 105 Mass. 276, in New York, *Cullen v. National Roofing Co.*, 114 N. Y. 45, and in many other jurisdictions (Keener, Qu. Cont. 215, n. 2) it is generally held that if plaintiff has wilfully refused to perform the conditions of a contract, he cannot recover for the benefits which the defendant has received by the partial performance. In New Hampshire, *Britton v. Turner*, 6 N. H. 481, the plaintiff may recover, and this doctrine prevails in Iowa, Indiana, Kansas, Nebraska, North Carolina, and Texas (Keener Qu. Cont. 218, n. 2). In Missouri, the rule is peculiar, for although the doctrine of the principal case is generally followed, *Gruetzmeyer v. Ande Furniture Co.*, 28 Mo. App. 263, yet plaintiff may recover in cases of building contracts. *Gregg v. Dunn*, 38 Mo. App. 283.

In cases of this kind the courts have not noticed any distinction between contracts where the broken condition is express, and where it is simply implied; and yet it would seem that such a distinction might well be made. Where an express condition is introduced into a contract of this kind, it is put in for the express purpose of guarding against a wilful breach, such must be the intention of the parties in nearly all cases; therefore, to allow a recovery in *quasi-contract* would be, under such conditions, quite useless; in short, there are no equitable grounds on which plaintiff can claim relief. In the case of an implied condition, however, there is a difference. An implied condition is, strictly, nothing more than an equitable excuse for not having performed; the whole question therefor is equitable, and is reduced to determining whether, even in the case of a wilful breach, it is just that plaintiff should not be allowed to recover for benefits conferred on the defendant; and it is submitted that it is not just, and that in such cases a recovery should be allowed.

TORTS — DANGEROUS PREMISES. — On demurrer to a declaration stating that the defendant invited and induced the public to use a path over his premises, near a storehouse; that the storehouse burned down, leaving a cistern exposed, which the defendant kept guarded until it caved in, when he removed the guards, and the plaintiff using the path, fell into the cistern; it is *held*, that a good cause of action is stated. *Lepuick v. Gaddis*, 16 So. Rep. 213 (Miss.).

The declaration alleges an invitation by the defendant to the public to use his premises, but it would seem really to be a license only. The court, also, says that "implied invitation" imports knowledge by the defendant of the probable use of his property, so situated as to be open to use by the plaintiff. This language, it is submitted, would include a trespasser if the likelihood of trespass were known to the owner, and is quite too broad. A license does not cease to be a license merely because it is intended to be used, and it entails a different duty upon the owner than an implied invitation. However, the result reached would seem to be right, the proper ground for the decision



being that though the plaintiff was a mere licensee, the defendant was still liable for making the premises more dangerous without notice.

**TORTS—DECEIT—MEANS OF KNOWLEDGE.**—Action for deceit in the sale of land. The court *held*, that it was for the jury to say whether plaintiff was or was not foolish in relying on defendant's statements. *Brady v. Finn*, 38 N. E. Rep. 506 (Mass.).

The court assume that plaintiff and defendant had an equal chance of finding out the truth of the representations, which assumption seems incorrect. The land was in a remote and inaccessible town, and of course the owner knew much more about the land than the stranger. But assuming that plaintiff could have informed himself in regard to the land as easily as defendant, was it necessary to leave the question of plaintiff's negligence to the jury, or to discuss it? Negligence cannot exist unless there is a duty on the part of plaintiff to act or forbear. Is there any more duty to use due care before acting on a false representation made with knowledge of its falsity and intending to deceive, than to use such care in avoiding or jumping out of the way of a man who intentionally hits or shoots at you? It is submitted that there is not. "No man can complain that another has relied too implicitly on the truth of what he himself stated." *Kerr on Fraud*, p. 81. "It is no excuse for, nor does it lie in the mouth of the defendant to aver, that plaintiff might have discovered the wrong and prevented its accomplishment, had he exercised watchfulness, because this is equivalent to saying, 'You trusted me, therefore I had the right to betray you.'" *Pomeroy v. Benton*, 57 Mo. 531. To the same effect, 57 Mo. 478; 2 Bish. New Cr. Law, §§ 433-436 and 464. *Bigelow on Fraud*, pp. 522, 523, and 528. 121 Ind. 191, and 8 HARVARD LAW REVIEW, 63.

**TORTS—INJURY TO WIFE—DAMAGES.**—Action for loss of service. While attempting to enter a car of the defendants, the plaintiff's wife was injured through the negligence of the guard in closing the gate upon her. She had been pregnant for a few weeks, and, as a result of the injury, miscarried. *Held* (reversing the decision of the court below), that plaintiff cannot recover damages for the loss of prospective offspring. *Butler v. Manhattan, &c. R. R.*, 38 N. E. Rep. 454 (N. Y.).

As is pointed out at common law, the death of a person, caused by the negligence of another, gave no right of action for damages to the kindred of the deceased. This was changed in England by the statute known as Lord Campbell's Act, the provisors of which were adopted in New York (Laws, 1847, c. 450, and Laws, 1849, c. 256) and in other States. Under it, actions may be maintained for the death of infant children for the benefit of their parents, the basis of damage being the supposed pecuniary value to the parents of the infant's life. *Birkett v. Ice Co.*, 100 N. Y. 504, and cases cited. To ascertain such value is, in great degree, a matter of speculation and conjecture, yet the law permits juries to determine it. They have some slight aids, however, the facts of the age, sex, and health of the child, its grade of intelligence, &c. These are lacking in the case of a child unborn, and the court refuse to extend the law to include cases of this nature. No authorities are cited for the position taken, but the decision seems sound.

**TORTS—INSANITY—ACTION FOR NEGLIGENCE.**—While temporarily insane, the master of a vessel, whose rudder was broken so that she could not be steered, allowed the vessel to drift ashore, refusing the proffered assistance of two tugs, and making no attempt to save her, whereby she became a total wreck. In an action against the master for negligence in the management of the vessel, it was *held* that such insanity not having been caused by defendant's efforts to save the vessel, was no defence. (Peckham, Gray, and O'Brien, JJ., dissenting.) *Williams v. Hays*, 38 N. E. Rep. 449 (N. Y.).

It is difficult to see upon what grounds the dissenting judges went,—their opinions are not reported,—for it is almost too well settled to admit of argument that an insane person is liable for his torts, whether of misfeasance or of non-feasance. See the exhaustive collection of cases and text-writers cited in the opinion. In Wharton on Negligence, § 88, it is stated that lunatics cannot be held responsible for any greater degree of care than they possess, but as is pointed out in Shearman and Redfield on Negligence, the authorities cited there are either cases of contributory negligence or dicta from the Roman law.

## REVIEWS.

A REVIEW IN LAW AND EQUITY, FOR LAW STUDENTS, together with a Summary of the Rules regulating admission to Practice throughout the United States. A Hand-Book for Law Students. By George E. Gardner of the Massachusetts Bar. New York: Baker, Voorhis & Co. 1895. 8vo. pp. xvi, 299.

This little book, as its title indicates, is designed as a help to students making their final preparations for admission to the Bar. It endeavors to cover in less than three hundred pages "the leading principles of those branches of the law which are seriously taught in the law schools of the country, and which form the subjects of Bar examinations."

Where conciseness is so much insisted on, a prominent place must necessarily be given to definition, division, and sub-division. This method of treatment, as might be expected, is more nearly satisfactory in the obsolete and highly technical parts of the law of real property than in such subjects as contracts or criminal law where the boiling down process is occasionally carried so far as to be misleading. Thus on page 219 we are told that ignorance of the fact that an act is unlawful is not an excuse for crime, and in illustration the case is put of selling adulterated milk contrary to statute, where ignorance that the milk is adulterated is no defence. "But there must be an intent to make the sale." Although the proposition of law is undoubtedly correct, it would seem better not to confuse the subject of general criminal intent with intent in a few classes of statutory crimes. In the great majority of cases, however, the meaning is sufficiently clear, and there are frequent useful reminders of points likely to trip the unwary.

The rules regulating admission to the Bar in the various States and territories are appended to the book, and there is also an index and table of text-books cited. On the whole, the author's object has been accomplished as well or better than could have been expected within the very narrow limits which he has prescribed for himself and which he considers essential to the value of a book of this class.

A. K. G.

HANDBOOK OF THE LAW OF CONTRACTS. By William L. Clark. St. Paul: West Publ. Co. 1894. (Hornbook Series.)

This is a concise and, on the whole, good statement of the law of contracts. The object of the author, "to present the general principles of contracts clearly and concisely, with proper illustrations and explanations—not to make a digest," has been attained with considerable success. Extensive use has been made of standard works like Leake and Anson, and Professor Keener's recent treatise on Quasi-Contracts has received its share of attention. No attempt at originality has been made, and wisely so, in a book of this character. Over 10,000 cases are cited, and the author states that extreme care has been used in their collection. The work seems to be the best done so far in this series. As a "horn-book," it is well worth the attention of those who seek a brief but comprehensive view of the subject, or any branch of it.

F. B. W.

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## SALES OF STANDING TREES.

ARE sales of standing trees within the Statute of Frauds? Do they involve any "interest in or concerning land"?

This question arises in various ways: sometimes in a suit by the buyer against the seller for breach of contract in not allowing him to remove the trees; sometimes in a suit by the seller for the price of the trees which the buyer has or has not taken away; sometimes in actions of trespass by the seller against the buyer for entering on the land and cutting the trees, either after or before having been forbidden to do so, or *vice versa*; and occasionally in an action between the buyer and a subsequent grantee of the land before the trees have been cut, and either with or without notice of the prior sale of the trees. Different considerations may apply under these different circumstances, which may in part account for some of the apparently conflicting views expressed on this question. It may not be possible to reconcile all the decisions, much less all the *dicta*, on this subject, but the general drift of the cases seems to support several propositions.

I. The first is where the vendor has expressly stipulated that the trees may remain standing on the land a given *number of years*, if the purchaser elects. Here, as they may, and probably will, derive more or less growth and increase from the soil, there is some reason to hold that the sale involves an "interest in land." In fact it has been considered a sale not only of the trees as they then



are, but as they will be at the end of the stipulated period, with all the additions to them subsequently acquired from the soil.

The case of *Green v. Armstrong*,<sup>1</sup> deserves to be considered the leading one on this point. The vendee there had the right to cut and carry away the trees "at any time within twenty years;" and after he had cut a part, the vendor forbid him to cut the rest, — or, in other words, revoked his license, — and the vendee brought an action on the contract for damages, but it was held he could not recover as the contract was only oral. This decision has been often approved in New York.<sup>2</sup>

The subject was elaborately examined with the same conclusion in *Kingsley v. Holbrook*,<sup>3</sup> where the time allowed was three years; and this was approved in *Howe v. Bachelder*.<sup>4</sup>

2. The second class of cases is where the trees are to stand for an *indefinite time*, and to be severed solely at the pleasure of the buyer. Here also some decisions and more *dicta* declare that the same rule applies and that the Statute requires a writing.

*Buck v. Pickwell*<sup>5</sup> is one of the most important of this class. There the purchaser of the trees had an absolutely indefinite time in which to take them off. The vendor sold and conveyed the land before the trees had been cut, and after twenty years a subsequent grantee of the land, whose deed contained no reservation of the trees, cut and carried away the remainder, and the first purchaser sued him in *trespass* for cutting down his growing trees. Obviously, the case on those facts could be decided in only one way; for even if the oral sale had been held originally valid, the subsequent conveyance of the land before the trees had been cut would have revoked the license to enter and cut them, and the plaintiff would have been liable to the defendant in trespass for such act; of course, then, he could hardly expect the defendant would be liable to him for the very same cutting. The point of revocation, however, does not seem to have been made in the case, and although the decision itself is correct, even on the ground upon which it was put, yet the same court has declined to extend it "beyond the very point in judgment."<sup>6</sup>

<sup>1</sup> 1 Denio, 550 (1845).

<sup>2</sup> See *McGregor v. Brown*, 6 Seld. 114; *Vorsebeck v. Roe*, 50 Barb. 302; *Goodyear v. Voseburgh*, 57 Barb. 243.

<sup>3</sup> 45 N. H. 313 (1864).

<sup>4</sup> 49 N. H. 204 (1870). See also *Putney v. Day*, 6 N. H. 430 (1833), and *Olmstead v. Niles*, 7 N. H. 522 (1835), where the time allowed was twenty-five years.

<sup>5</sup> 27 Vt. 157 (1854).

<sup>6</sup> See *Sterling v. Baldwin*, 42 Vt. 309.

Scorell *v.* Boxall<sup>1</sup> is very similar. The plaintiff had bought a lot of growing underwood which the defendants (not the vendor) cut and carried away, and for which the buyer brought trespass, "a possessory action;" and it was held he had not such a possession as to enable him to maintain that particular action, though the language of the judges might have been more general. Conversely, in Harrell *v.* Miller<sup>2</sup> the subsequent vendee of the land, with no reservation of the trees, was allowed to recover against a previous oral buyer of them who, after the deed had been made, cut and carried away the trees.

Pennsylvania has also frequently declared that if the trees are to stand an indefinite time the sale is within the Statute.<sup>3</sup> The time of the removal was also indefinite in Hostetter *v.* Auman,<sup>4</sup> with the same result.<sup>5</sup>

Some of the objections raised in these cases to indefinite licenses would be obviated, or diminished at least, by construing the license to continue only for a reasonable time, which might be considered to be only so long as the trees were in substantially the same condition as when sold. On that view, the license would terminate and the trees be forfeited, if allowed to stand too long.<sup>6</sup>

3. Still another view is that if the trees are sold "as trees," and are not to be first cut by the vendor and delivered in their new condition, it is immaterial whether they are to stand, or do in fact stand, a long or a short time after the sale; in either case they are to be considered at the time of sale as realty, and therefore the Statute applies. This subject was recently examined in Hirth *v.* Graham,<sup>7</sup> where it was held to be immaterial whether the parties did or did not contemplate an immediate severance and removal of the trees, the contract of sale was invalid if not in writing; so invalid that even the buyer could not maintain an action upon it against the seller for refusing to allow him to take the trees, — the Court saying, "the question whether such sale is a sale of an interest in or concerning land, should depend, *not upon the intention of*

<sup>1</sup> 1 Y. & J. 396 (1827).

<sup>2</sup> 35 Miss. 700 (1858).

<sup>3</sup> Pattison's Appeal, 61 Pa. St. 294 (1869); Bowers *v.* Bowers, 95 ib. 477 (1880); Miller *v.* Zufall, 113 ib. 317 (1886.)

<sup>4</sup> 119 Ind. 7 (1888).

<sup>5</sup> See also Yeakle *v.* Jacob, 33 Pa. St. 376; Huff *v.* McCauley, 53 Pa. St. 206.

<sup>6</sup> See Hill *v.* Hill, 113 Mass. 103; Hill *v.* Cutting, ib. 107; Gilmore *v.* Wilbur, 12 Pick. 120; Heflin *v.* Bingham, 56 Ala. 566.

<sup>7</sup> 50 Ohio St. 57 (1893).

*the parties, but upon the legal character of the subject of the contract, which, in the case of growing timber, is that of realty."*

This rule certainly has the merit of simplicity and ease of application, avoiding, as it does, an inquiry as to the precise time the trees are to stand before they are to be cut by the buyer, and whether such time is or is not reasonable. It has many respectable authorities in its support.<sup>1</sup>

4. On the other hand, there is much authority as well as reason for holding that if either expressly or by a fair construction of the contract, the trees are *forthwith* or *within a reasonable time* to be cut and severed from the realty and thus made personal property (no matter by which party), and are not to gain additional growth and size from the soil, it is not a sale of any "interest in land" and not within the Statute.

The earliest announcement of this doctrine seems to be in 1 Ld. Raymond, 182 (1697), and where it is thus stated: "Treby, C. J., reported to the other Justices that it was a question before him in a trial at *nisi prius* at Guildhall, whether the sale of timber growing upon the land ought to be in writing by the Statute of Frauds, or might be by parol. And he was of opinion and gave the rule accordingly, that it might be by parol, because it is but a bare chattel. And to his opinion Powell, J., agreed." This report is rather indefinite as to the terms and nature of the sale, and perhaps could not be pressed into supporting sales of trees to stand a long time on the vendor's land. Maine seems to have first adopted this view in America, for in *Erskine v. Plummer*,<sup>2</sup> it was held that a sale of timber by parol to be cut and carried away by the purchaser "within a reasonable time, or as soon as it can conveniently be done," is not within the Statute. *Banton v. Shorey*,<sup>3</sup> is similar.

So in *Whitmarsh v. Walker*,<sup>4</sup> the defendant orally sold the plaintiff two thousand mulberry-trees then growing in his nursery, which were "raised to be sold and transplanted," and which were to be delivered on the ground by the defendant when called for. The defendant refused to deliver, and the action was for a breach

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<sup>1</sup> See *Slocum v. Seymour*, 36 N. J. L. 138; *Owens v. Lewis*, 46 Ind. 488, where the subject is elaborately considered, and is approved in *Armstrong v. Lawson*, 73 Ind. 500. And see *Coody v. The Gress Lumber Co.*, 82 Ga. 798; *Daniels v. Bailey*, 43 Wis. 566; *Knox v. Haralson*, 2 Tenn. Ch. R. 237; *Summers v. Cook*, 28 Grant, Ch. 179; *Rhodes v. Baker*, 1 Ir. Com. L. R. 488 (1851), and many other cases.

<sup>2</sup> 7 Greenl. 447 (1831).

<sup>3</sup> 77 Me. 48 (1885).

<sup>4</sup> 1 Met. 313 (1840).



of that contract. It was held that the sale was valid, though oral; that the defendant undertook to either sever the trees from the soil, and deliver them to the plaintiff, or else to permit the plaintiff to sever them, and it was immaterial whether the severance was to be made by the plaintiff or by the defendant. And although the license to the plaintiff to enter and sever them passed no interest in the land, and might be revoked by the defendant before the trees were removed, yet, said the Court, "if he exercised his legal right in violation of his agreement, he is responsible in damages," and the plaintiff had a verdict.

In *Claflin v. Carpenter*,<sup>1</sup> the plaintiffs had sold to one McDavit "a quantity of wood and timber, part of which was cut and lying on their land, and part uncut and standing," and McDavit immediately mortgaged it back to them to secure the payment therefor, which mortgage was recorded only in the records of mortgages of personal property, and not in the registry of deeds of real estate. McDavit subsequently sold and delivered some of the wood to the defendant, who had no knowledge of the mortgage. It was held that both the wood which was cut and that which was standing when the mortgage was made was to be considered as personal property and not real estate; that the mortgage was properly recorded as a personal property mortgage, and that trover would lie against the purchaser after a demand and refusal. See also *Cain v. McGuire*.<sup>2</sup> In *Nettleton v. Sikes*,<sup>3</sup> the plaintiff orally contracted with the defendant that he might cut a quantity of white oak trees on the plaintiff's land, take the bark therefrom at a certain price per cord, and cut up the wood for the plaintiff, at the market price for cutting. The defendant cut a number of the trees and peeled the bark therefrom, but before it had been taken away he was forbidden by the plaintiff to enter again upon the land. Subsequently the defendant did enter and carry away the bark, for which the plaintiff brought *trespass quare clausum*. It was held that if the defendant merely had a *license* to enter, it might be revoked, and the action would lie; but that if there was a valid *contract* that he might cut the trees and take off the bark, it could not be revoked or rescinded after the bark had been peeled, so as to make him a trespasser for carrying it away, and that an oral contract was suffi-

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<sup>1</sup> 4 Met. 580 (1842).

<sup>2</sup> 13 B. Monr. 340 (1852); *Douglas v. Shumway*, 13 Gray, 502 (1859).

<sup>3</sup> 8 Met. 34 (1844).

cient. The action was not maintained. In *Byassee v. Reese*,<sup>1</sup> the oral sale was held good even as against a subsequent grantee of the land without notice of the sale, the trees, however, having been already selected and marked by the buyer. This is the very strongest effect that can be given to such an oral sale, and may perhaps have gone too far in that direction.

*Smith v. Bryan*<sup>2</sup> (often cited in favor of the oral contract) does not really add much strength to that view. There the owner of land sold by writing (but apparently not under seal) a quantity of oak and pine trees then standing on his land, for \$1,200, with two years to remove them. The buyer cut and carried away some of the trees, and then orally *resold to the owner of the land* those uncut, which he refused to pay for; and in a suit for the price the Court held that the plaintiff could recover. See also *Green v. North Carolina Railroad Co.*<sup>3</sup> Clearly so; the buyer could hardly expect to keep his trees and his money too. A statute that permitted such results would be a statute of frauds indeed!

Perhaps the most important recent case on this subject is that of *Marshall v. Green*.<sup>4</sup> The plaintiff on the 27th of February orally sold the defendant twenty-two standing trees, "to be got away as soon as possible." On the 2d of March the defendant cut six of the trees, when the plaintiff countermanded the sale, demanding an alteration of the terms. The defendant, notwithstanding, proceeded to cut the remaining trees on the 3d and 4th of March, and carried them all away. Whereupon the plaintiff brought an action in one count for trespass to the land, and a second count for trover. He was not allowed to recover on either count, because the oral sale was held valid and not within the Statute, — Coleridge, J., saying: "If the matter were *res integra*, I should be inclined to think there was much to be said for Littledale's, J., view, that the words of the Statute were never meant to apply to such a matter as this at all, but only referred to such interests as are known to conveyancers. It is, however, too late now to maintain this view, inasmuch as there are a great number of decisions which proceed on the opposite view. It is clear on the decisions that there are certain natural growths which, under certain circumstances, have been held to be within the words of the section, and a contract with respect to which must therefore be in writing. The question then is,

<sup>1</sup> 4 Met. (Ky.) 372 (1863).

<sup>2</sup> 5 Md. 141 (1853).

<sup>3</sup> 73 N. C. 524 (1875); *Teal v. Auty*, 2 Br. & B. 99.

<sup>4</sup> 1 C. P. Div. 35 (1875).

Which is the rule to be? The matter has been much discussed, and for my part I despair of laying down any rule which can stand the test of every conceivable case.

It is said that there is an interest in lands within the statute when the sale is of something which, before it is taken away, is to derive benefit from the land, and to become altered by virtue of what it draws from the soil. The rule is an intelligible one, but one which it is almost impossible to apply with absolute strictness. The effect of such a rule, if strictly applied, would vary at different times of the year. If the sale was in the spring, and the removal of the thing sold were to be postponed but for two or three days, it would not, at its severance, in strictness be in the same state as it was at the time of sale. On the other hand, in winter, when the sap is out of the tree, and it is standing, as it were, dead for the time being, there would be no appreciable change. It is almost impossible to say that the rule can be that, wherever anything, however small, is to pass into that which grows on the land out of the land, between the sale and the reduction into possession the contract is within the section." Brett and Grove, JJ., concurred in these general views, and the verdict for the plaintiff was set aside.

This class of cases is based upon the principle that the contract is to be considered as an executory agreement for a sale, to take effect only when the trees are severed from the land, and converted into personal property, coupled, however, with a license to the purchaser to enter, sever, and remove the trees, if the seller is not to do so.<sup>1</sup> The moment they are cut they become the personal property of the purchaser and may be sold by him, like any other personal property, and *his* purchaser has the same right to go and take them away; for the license to remove then becomes irrevocable.<sup>2</sup> The license may be revoked *before* the cutting, since the trees are not yet the property of the purchaser, and if revoked, his only remedy is against the seller for breach of contract in not allowing him to enter and take the trees, the same as in a refusal to deliver any other personal property contracted for. This was the case in *Whitmarsh v. Walker*.<sup>3</sup> In other words, the buyer of

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<sup>1</sup> See *Hill v. Hill*, 113 Mass. 103 (1873); *United Society v. Brooks*, 145 Mass. 415 (1888); *Fletcher v. Livingston*, 153 Mass. 390 (1891).

<sup>2</sup> *Yale v. Seely*, 15 Vt. 221 (1843); *Nelson v. Nelson*, 6 Gray, 385 (1856); *Cool v. The Peters Box and Lumber Company*, 87 Ind. 531 (1882).]

<sup>3</sup> 1 Met. 313.



trees by an oral bargain with leave to enter, cut, and carry them away forthwith, acquires no interest *in* the land, but only a license to enter *upon* the land, etc., a mere permission, which prevents such entry from being a trespass, but which may be revoked before it is acted upon; and an entry afterwards would undoubtedly be a trespass for which an action would lie.<sup>1</sup> But this does not touch the question of the liability of the vendor to the vendee for revoking the license, and so depriving the vendee of the power to take and carry away his purchase, which is the real test of the validity of the contract. Much stress seems to be sometimes laid on the circumstance which party is to cut the trees. That seems quite immaterial, except that where the seller agrees to do so, and to deliver the thing sold, either as cordwood or as timber, *it more clearly appears* to be a sale, not of trees, but of what had once been trees, but was so no longer. This was really the case of *Smith v. Surman*.<sup>2</sup> The seller was to cut the trees and *measure them* in order to ascertain the price, as the sale was of "timber," at so much per foot. The judges thought it was not a sale of "standing trees" at all, but only of so many feet of timber, and of course not within this branch of the Statute. And this has been so held even in New York, notwithstanding the case of *Green v. Armstrong*.<sup>3</sup> But if the *vendee* has a right to enter and cut the trees and *does so*, they are thereby changed into personal property as much as if cut by the vendor, and it can make no difference by whom the axe is wielded.

Any article on the sale of standing trees would certainly be incomplete which made no allusion to two other somewhat similar sales, namely, that of annual crops, and that of other articles usually considered as parts of the realty.

1. It now seems to be the better rule that sale of annual crops, such as potatoes, turnips, etc., are not within the Statute, whether they are then mature or not. In some instances apparently the crop attained most of its growth after the sale, but that fact was thought quite immaterial.<sup>4</sup> The same rule has often been declared

<sup>1</sup> *Giles v. Simonds*, 15 Gray, 441 (1860); *Drake v. Wells*, 11 Allen, 141 (1865).

<sup>2</sup> 9 B. & C. 561; 4 M. & R. 455 (1829).

<sup>3</sup> 1 Denio, before cited. *Killmore v. Howlett*, 48 N. Y. 569; *Boyce v. Washburn*, 4 Hun 792.

<sup>4</sup> *Parker v. Staniland*, 11 East, 362; *Warwick v. Bruce*, 2 Maule & S. 208; *Evans v. Roberts*, 5 B. & C. 829; 8 D. & R. 611; *Dunne v. Ferguson*, Hayes, 540; *Sainsbury v. Matthews*, 4 M. & W. 343, a marked case; *Jones v. Flint*, 2 P. & D. 594; 10 Ad. & El. 753.

in this country.<sup>1</sup> So also as to crops of growing grain.<sup>2</sup> The same principle has been extended to natural crops, such as grass, fruit, etc.<sup>3</sup>

Mr. Browne, in his excellent work on the Statute of Frauds, thus states the result of his thorough and critical examination of all the cases on this point, He says (Sect. 237): —

“Upon a careful examination, the more approved and satisfactory rule seems to be that, if sold specifically, and to be by the terms of the contract delivered separately and as chattels, such a contract of sale is not affected by the fourth section of the statute, as amounting to a sale of any interest in the land, and that the rule is the same when the transaction is of this kind, *whether the product sold be trees, grass, and other spontaneous growth, or grains, vegetables or other crops raised by periodical cultivation.*”<sup>4</sup>

2. As to the second class of cases referred to, namely, that of sales of articles attached to the freehold and which would pass with a deed of the land itself, unless reserved, it is now commonly thought (though even here some diversity exists) that oral sales may be valid of such things as old buildings to be presently removed or torn down, piles of manure, gravel hills, loads of stone or loam, stacks of peat in process of curing, ice ponds, stone walls, etc., all to be taken and carried away.<sup>5</sup>

Probably the earliest case on this subject is *Boswick v. Leach*.<sup>6</sup> There the plaintiff had orally sold to the defendant parts of his gristmill, such as mill-stones, running gear, etc., but which the defendant refused to take away and pay for. The plaintiff was allowed to recover the price, — the Court saying that “where there is a sale of property which would pass by a deed of the land, but

<sup>1</sup> *Northern v. The State*, 1 Ind. 113; *Bull v. Griswold*, 19 Ill. 631; *Bricker v. Hughes*, 4 Ind. 146.

<sup>2</sup> *Westbrook v. Eagar*, 16 N. J. L. 81; *Bryant v. Crosby*, 40 Me. 22; *Austin v. Sawyer*, 9 Cow. 39; *Marshall v. Ferguson*, 23 Calif. 65; *Davis v. McFarlane*, 37 ib. 634.

<sup>3</sup> *Cutler v. Pope*, 13 Me. 377; *Purner v. Piercy*, 40 Md. 212; *Vulicevich v. Skinner*, 77 Calif. 239; *Smock v. Smock*, 37 Mo. Ap. 56, an excellent case on this point, though even here the decisions are not uniform.

<sup>4</sup> See also *Sterling v. Baldwin*, 42 Vt. 306; *Marshall v. Green*, 1 C. P. Div. 35.

<sup>5</sup> See *Higgins v. Kusterer*, 41 Mich. 318; *Shaw v. Carbrey*, 13 Allen, 462; *Long v. White*, 42 Ohio St. 59; *Poor v. Oakman*, 104 Mass. 316; *Strong v. Doyle*, 110 Mass. 93; *Gile v. Stevens*, 13 Gray, 146; *Georgeson v. Geach*, 3 Vict. L. R. (Cases at Law) 144.

<sup>6</sup> 3 Day, 476 (1809).

it can be separated and by the contract is to be separated, such a contract is not within the Statute. Such are contracts for the purchase of gravel, stones, timber, trees, and the boards and bricks of houses to be torn down and carried away."

The result of our examination of the cases on this whole subject is that neither the distinction between natural and artificial crops, nor between mature and immature crops, nor whether the buyer or the seller is to remove the thing sold from the ground, nor whether the subject of the sale would go to the heir or to the executor, or would or would not pass under a deed of the land itself, has proved satisfactory. Each of these distinctions has been advanced in some case only to be denied in the next.

Apparently it would have been wiser, or certainly more simple, to have held in the outset that the phrase "interest in land," meant some kind of *title*, *right*, or *property* in the land itself, some *estate*, either permanent or temporary, and not merely some transient or collateral *use*, *benefit*, or *advantage* from the land. Such a construction would have avoided the apparent inconsistency of allowing oral sales of annual crops to be valid, although they must remain several months in the ground, drawing nourishment and strength therefrom, and denying the same result to sales of trees, which stand only the same length of time, and without any perceptible increase in the mean time. It would also have avoided another equally unnecessary distinction of sustaining oral sales of other parts of the freehold, and denying the validity of sales of trees. But it is now probably too late to everywhere establish such a rule without legislative enactment.

*Edmund H. Bennett.*

BOSTON, Jan. 1, 1895.



## A GENERAL ANALYSIS OF TORT-RELATIONS.

IN a former article in this Review,<sup>1</sup> an attempt was made by the writer to set forth briefly the tripartite division of the tort-relation, as embodying the prime elements in every so-called tort. This analysis distinguished: *first*, the Damage element, *i. e.* the various kinds of harm, corporal, social, proprietary, and other, which the law recognizes as the subject of a recovery; *secondly*, the Responsibility element, *i. e.* the principles which determine whether, under given circumstances, a particular person is to be held responsible for the infliction of one of these kinds of legal harm; and *thirdly*, the Excuse or Justification element, *i. e.* the conditions in which no legal liability is recognized, even though there may exist a conceded or assumed responsibility for a conceded or assumed harm. With a reference to that article for an exposition of this general grouping, a further attempt will here be made to analyze the different groupings within these broad divisions, and to illustrate and test their validity by noting the appropriate place of the detailed and concrete sub-topics.

It must be said in advance: 1. That there is no intention of indicating the solution of any doubtful problems, or of assuming the correctness of any view of what the particular rule is or ought to be; the aim is merely that of marking out the field: 2. That the analysis is necessarily rough and often tentative only, and space often compels a disregard of minor qualifications: 3. That, as to method, the fundamental idea is, not to follow fancy nor to force a symmetrical grouping, but, neglecting accidents of appearance and surface differences, to examine reasons and causes, to ascertain the intrinsic meaning of principles and the considerations actually treated as controlling decisions, and thus at once to reach a scientific and natural basis of grouping, as well as to indicate the true lines of argument and discussion on which the development of principles must proceed.

We take first the Damage element.

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<sup>1</sup> Vol. viii. p. 200.

## I.

The general question here is, What are the features of the various kinds of harm which give rise to different problems, and therefore point out different lines of division? In this field of Tort, we have, of course, a number of different harms well recognized and defined. The juristic problems of to-day (excluding mere detailed applications of accepted principles) are here chiefly to determine the scope of particular well-established harms so as to develop them in accordance with to-day's conditions, and to indicate the proper analogies to be employed in ruling upon newly offered varieties of harm. Of the former, an illustration is found in the claim by a wife for the seduction of a husband; of the latter, in claims based on the so-called right of privacy. In attempting to group the topics, therefore, we should set together those varieties of harm with reference to which the same or similar doubts and difficulties arise, and the same or similar policies may come into consideration.

Taking up first the harms which concern the person, and, among these, physical injuries—being those which may be regarded as jurally the most fundamental and historically the earliest and gravest,—

1. We find among these at the outset that so-called "technical" battery, having a traditional origin but still a living justification for existence,—a mere touching. This is one example of what may perhaps be uncouthly termed "prophylactic" rights. In these it is conceded that no demonstrable harm is done, and nominal compensation alone is allowed, but yet on grounds of policy we desire to protect stringently by a kind of outpost-right; we therefore (as in battery, in trespass generally, in libel and partly in slander, in statutory patent-right, copyright, and trademark-right) make specific conduct actionable because (perhaps) we believe it to be so commonly followed by substantial harm that it would be practically too burdensome to require in each case an investigation into the details of harm; we accordingly protect the claimant at the very threshold of an important personal or property interest. We may take it that the action for a mere touching is one which, for some such reasons, no one would to-day move to abolish. The only problems involved are as to the extent of the sphere of protection thus specially sanctioned—whether it includes the clothes, articles carried, animals driven or led, etc.

2. Next we may group veritable physical injuries, of whatever sort,—cuts, blows, disease, and the like. The controversies in this connection concern commonly the naturalness and probability of the harmful result with reference to the defendant's conduct, and belong therefore under the Responsibility heading below. The exact nature of the harm is often of consequence in connection with the measure of damages. Other than these, the most points are few. Of recent years, discussion has arisen as to claims based on nervous disorders, especially when caused without physical contact. The question is then usually, from the present point of view, whether the injury or suffering is a physical, not merely a mental one; and, if so, whether there is any reason why it should be denied the recovery which is granted for all other physical injuries. It is not always observed that there may be in this respect a distinction between (1) mere fright (a mental injury; see *post*) and (2) positive physical illness resulting from fright.

3. Next to physical injuries may be grouped those annoyances and offences to the senses which do not amount to illness or wounding, but yet are positive harms; they are covered in ordinary legal diction by the term "Nuisance."<sup>1</sup> Many affect merely a single sense—hearing, sight, or smell—but most are of a mixed character. They fall naturally together in treatment; *first*, because they often bring us to the border-land at which *de minimis non curat lex*, and they frequently call upon the judges for attempts to define the boundary in satisfactory terms; *secondly*, they are usually worth considering for those only who are continually exposed to them, *i. e.* the owners or occupiers of land; and hence there are certain questions common to all of them, in that *e. g.* some interest in land must usually be shown in order to base a claim, and it is commonly said that the harm is to be tested by its effect in depreciating the value of land or in rendering it uncomfortable to life. The claims seem at bottom, however, to be based on a personal harm.<sup>2</sup>

We come next, naturally, to "mental" injuries, so-called, the idea of which, as distinguished from physical injuries, is that they are

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<sup>1</sup> So far as a distinct health-injury is covered by this term, it belongs in theory in the preceding class.

<sup>2</sup> Certainly there are numerous cases where the claim is recognized independently of any property-right in the claimant. One of the best recent examples is the action allowed in England against a newsboy for offensive noise in crying his papers (*Innes v. Newman*, L. R. '94, 2 Q. B. 292), though a municipal regulation was there involved.



subjective, and do not involve any corporal affection. A general and uniting feature is the constant necessity of guarding against the recognition of imaginary or trifling troubles, or of claims likely to be based on misrepresentation or individual idiosyncrasies. Several distinct groups, however, may be noted.

4. First, terror or fright at impending physical violence has long been recognized in the action for Assault (anciently "Menace"), which calls for a number of detailed distinctions. As yet an action for fright indirectly caused — as in a collision or by blasting — cannot be said to be recognized; though, so far as the legitimacy of the Damage element is concerned, the analogies favor it.

5. Another distinct sort of mental injury has also lately been much discussed, under the head of the "right to privacy." This seems to be in essence a right to be protected against that mental annoyance of a complex sort which results from the exposure of private affairs; and, though specific prevention is the remedy commonly desired, it seems likely that damages would be based on the above idea of the nature of the injury. Its delimitation has not yet been successfully effected, and cannot be for some time. A careful consideration of the distinction between the Damage element and the Excuse element would probably assist its orderly development.

6. A third group includes the miscellaneous forms of injury termed loosely "mental pain" or "mental anguish," — feelings of distress caused by libel, seduction of a daughter, alienation of marital affections, eviction from a house or a railway car, violation of a grave, failure to deliver a telegram, and by other conduct. The usual question, forming a common feature, is whether they should be recognized at all as the basis of a claim. A principle often applied is that there must be an accompanying physical injury, or perhaps some other admitted tort. Very often the only question is one of Responsibility, *i. e.* whether the harm was the natural consequence of the defendant's act. The telegram cases probably all belong under Contracts. Most of the above instances are treated as a part of the law of Damages; but a careful analysis shows us that a part of that branch of the law involves, not the mere measure of compensation for an admitted harm, but a determination whether a particular harm can be recognized at all as the basis of a claim; and this is properly a question of torts, so far as it involves not a contractual but a universal and irrecusable obligation.

Coming now to the societary rights (rights to social relations) in general, we find as the generic feature a right to be protected against the stoppage or diversion of benefits of various sorts to be gained from social and commercial relations with third persons. In this field there is as yet no accepted grouping, and it is, indeed, in connection with the Excuse element that the circumstances giving rise to the proper distinctions are suggested to us. A rough grouping of the relations may be made into (1) Domestic, (2) Contractual, and (3) Sundry Voluntary relations. The question here is, What sorts of relations may become the subject of a right against interference? Taking first the general class last mentioned, we find that there is a broad distinction between (*a*) the diversion of patronage by the reproduction of private literary and industrial inventions, and (*b*) the diversion of patronage by any other means. The latter it will be better to look at first.

7. The commonest questions that strictly belong here are two: (1) whether the relation in issue is the subject of a claim (it is said *e. g.* that it must be the source of some pecuniary or other material benefit)<sup>1</sup>; (2) whether the relation is the source of a benefit sufficiently constant or certain to be worth considering.<sup>2</sup> But we find under the Excuse element that certain kinds of interference, *e. g.* peaceable individual suasion, are concededly exempt from recovery, and that certain other kinds, *e. g.* defamatory or fraudulent interference, are concededly unexcused and actionable; and accordingly, for the better protection of the latter sort of right, certain additional "prophylactic" rights have been sanctioned; these we now come to. (3) Written defamation ("calculated to bring the plaintiff into hatred, ridicule, or contempt") and oral defamation (imputing a crime, a loathsome contagious disease, or a professional incapacity) are *ipso facto* and apart from actual damage protected against; for such conduct is regarded as almost inevitably bringing social harm, positive but more or less difficult to prove, and therefore worth forbidding at the threshold.<sup>3</sup> Of the whole law of libel and

<sup>1</sup> *E. g.* *Davies v. Solomon*, L. R. 9 Q. B. 112, where the loss of hospitality of friends was regarded as a sufficiently substantial harm.

<sup>2</sup> *E. g.* *Dudley v. Briggs*, 141 Mass. 582, where the single issue of a directory was held not to show sufficiently the existence of a good-will or market alleged to have been destroyed by the defendant.

<sup>3</sup> The cases on damages show that this right is intended to protect, not merely against social ostracism, but also against the feelings of shame and humiliation which also follow the publication of such false charges. It is this element of mental suffering which points to the present right as occupying the transition place between corporal and societary rights.

slander, we are of course here concerned only with that part which deals with the nature of the unlawful utterances and the fact of publication; other portions belong under the heads of Responsibility and Excuse. (4) The diversion of patronage by substitution of merchandise, etc., fraudulently represented as the plaintiff's (one of the unjustified forms of interference already mentioned) is also given special "prophylactic" protection, though this has come by statute, not by common law; by the registration of trademarks under statutory regulations an additional and stronger right is given. It is distinctly "prophylactic" in that the registered owner of the trademark-right does not base his claim upon a specific diversion of patronage; as in libel and in words slanderous *per se*, his right is against certain conduct, apart from actual harm done, — in this case, the right not to have the trademark used, whether or not a specific customer has been lost.<sup>1</sup>

8. The other sort of right just mentioned (under Sundry Voluntary relations) is the right against diversion of patronage by the reproduction of one's private inventions, literary and industrial, — the so-called common-law copyright and the right to trade-secrets. General convenience, however, demands that after publication to the community they shall cease. Yet here again, a "prophylactic" right has by statute been established on condition of registration according to certain regulations which make it possible to identify and authenticate one's creations, as it would not be without some such facilities; this absence of registrationary authentication probably justifies the common-law refusal to recognize the right of copy and of trade-secrets (they are analogous to patents) after publication.<sup>2</sup> The statutory right of patent and of copy is dis-

<sup>1</sup> Browne on Trademarks, §§ 468, 501 (the damage is said to be "presumed").

<sup>2</sup> Space does not suffice for detailed exposition of this analysis; but this much must be said: —

(a) The right to trade-secrets is sometimes placed on the ground of breach of confidence, *i. e.* a contractual duty. But the right would exist against one who had stolen a trade-secret as well as against the stealer of a manuscript lecture; and the former right seems to be genuinely a common-law patent-right, on the same footing as common-law copyright. (b) The right of privacy and the common-law copyright must be strictly distinguished. In such cases as Mr. Gilbert's suit against the "London Star" for giving out in advance the libretto of his new opera, and Miss Harriet Monroe's suit against the "New York World" for premature publication of the World's Fair Ode, the right of privacy is in no way involved. The purpose in such cases is to prevent the diversion of profits or injuring of the market available for the author's work; the author intends to publish in good time, and has a right to all the profits then to be secured. But in the genuine right of privacy the complainant is seeking not to conserve profits, but to prevent publication of that which he wishes to keep permanently private; the injury anticipated is not to his pocket but to his feelings.



tinctly a "prophylactic" one, because the registered owner need show no specific harm, *i. e.* his right is against the mere making for use, whether or not he can show the actual loss of a customer.<sup>1</sup>

9. Taking next the Domestic relations, and inquiring what relations and what kinds of benefits from them are recognized as the subject of a claim, we find in general that the filial, parental, and marital relations are thus recognized, with of course certain historical exceptions; that the loss of material benefits (support, services) is in the main the legal harm; and that the loss of affection, etc., is in part also recognized. The nature of the action for seduction is here involved. Modern statutes supplying defects of the common-law ("death by wrongful act") are to be considered, — in particular the difference between (1) statutes vesting recovery in those who have lost support, (2) statutes vesting recovery in relatives merely as such, and (3) statutes merely causing the deceased person's claim for corporal injury to survive.

10. Under Contractual relations no question arises as to their recognition; this is conceded. The question, What modes of interference are excusable and what are not? is one of Excuse.

11. In addition to the above sorts of harm to societary relations (7, 8, 9, 10; generalized in the paragraph preceding 7), the right is to have the benefit of certain relations preserved, not destroyed or diverted. But there is also a right of very limited application, which may be phrased as a right to have a burdensome relation not enlarged, not made more burdensome; the claim is based, not on the social benefits that would otherwise have come to us, but on the social burden that would otherwise not have come to us. The ordinary instance is that of medical expenses incurred in caring for an injured child or wife. Other instances, not yet judicially recognized, are found in *Anthony v. Slade*,<sup>2</sup> where a pauper whom the plaintiff was bound to support was beaten by the defendant, so that the plaintiff incurred additional expense in caring for him; and in *Midland Ins. Co. v. Smith*,<sup>3</sup> where an insurance company by the defendant's incendiary act was obliged to pay out insurance money which it might never have had to pay. It seems proper to distinguish this group from the preceding ones, because the considerations of Responsibility and Excuse may here be different.

<sup>1</sup> Robinson on Patents, §§ 898, 903; Drone on Copyright, pp. 521, 633.

<sup>2</sup> 11 Metc. 290.

<sup>3</sup> 6 Q. B. D. 565; also *Simpson v. Burrell*, 3 App. Cas. 289; *Ins. Co. v. Brame*, 95 U. S. 758. See also *Dale v. Grant*, 34 N. J. L. 142.

We pass now to the Proprietary ("property") rights. The field to be covered is a limited one; the largest part of property law being concerned with the subdivisions of rights and with the creation, transfer, and extinction of rights. A simple and workable line of division seems as follows: Conceive an object of property to be owned in fee simple, in severalty, unaffected by trust, mortgage, or easement; then the determination of the scope of this right, the statement of the harms against which it is the essence of the right of property to give protection, will properly fall under Torts; the description of the various subdivisions, such as estates, easements, mortgages, trusts, and joint titles, as well as the modes of creation, transfer, and extinction of the general property-right and of its different subdivisions, may be dealt with as distinctively Property law.

The grouping of the objects of the property right, then, for the purposes of Torts, seems to involve three kinds: (1) fixed, including land (with plantations and houses), stationary water, and aerial space; (2) detached, including portable things; (3) fluent, or accedant, including three sorts now to be mentioned. This grouping rests on similarities of policy within each group, and not on superficial resemblances.

12. The last class may be looked at now, from its analogies to the societary rights. There are three kinds: (a) There is a right to such benefit as may come by the resort of wild animals to our land, as game to be caught or shot, as furnishing eggs or other useful products, etc.; the right is to have them resort free from interference by the defendant, except so far as allowed by the limitations of the Excuse element.<sup>1</sup> (b) There is a right to have flowing water of certain sorts come to our land in its normal quantity and quality, a right that it shall arrive free from interference by the defendant, except so far as allowed by the limitations of the Excuse element (reasonable use, etc.).<sup>2</sup> (c) There is a right to have the effects of transmitted electrical force produced in and upon our premises, a right that the effects of means set in operation to that end shall freely be produced, except, as before, so far as

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<sup>1</sup> *Keeble v. Hickeringill*, 11 East, 574, *note*; 11 Mod. 74, 130.

<sup>2</sup> "He has the right to have it come to him in its natural state," etc. Lord Wensleydale, in *Chasemore v. Richards*, 7 H. L. C. 382. Since there is no property in the water itself before or after its passage through the plaintiff's land, the analogy to the case of wild animals seems the strongest. "Easement" seems inaccurate, for easements are partial or limited rights, and nobody has for running water any greater right than the one we now are considering.

allowed by the limitations of the Excuse element (reasonable competition).<sup>1</sup> The justification for grouping these three sorts together is found as well in the analogous nature of the object of the right as in the striking similarity of the appropriate Excuse limitations, — limitations very different from those allowed for interference with fixed and detached property, and decidedly analogous to those for interference with social relations.

13. The general nature of the other property rights (fixed and detached) seems to be a right that the thing shall not be (1) impaired, or (2) intruded upon or disseised. To this seem reducible the principles of the actions for trespass, conversion, and disseisin. It is neither necessary nor possible to go further here into the nature of the forbidden harms, the topics to be included being sufficiently clear. It must be noted, however, that there is recognized here also (as in trespass to the person) a "prophylactic" right, viz., a right against a mere touching or intrusion, apart from the infliction of actual harm.

We have now surveyed the different sorts of harm as to which every person is entitled to be protected as against every other person. We come now to the element of Responsibility, as already defined, *i. e.* the principles determining whether a given person is to be held responsible for an assumed or conceded harm.

## II.

The legal material involving the Responsibility element is much larger than that of the element just considered; but it is covered by a few broad principles. These raise many difficult and delicate problems in their application, as must often be the case when a simple principle is brought directly to bear upon a complex situation involving fairness of conduct; but these difficulties are rather for the practical judgment of the tribunal than for jurisprudence.

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<sup>1</sup> One is perhaps apt to suppose the analogy to the diversion of running water an exact one, as if the defendant tapped a flow of electricity towards the plaintiff's premises. This, however, would be erroneous. It is, of course, not that an electrical "current" flows along the wire. All we can say, perhaps, is that earth and atmosphere are constantly in an electrical condition, potential in effects; that the wire or other apparatus directs and concentrates these effects; and that the interfering person, by providing adjacent wires or other apparatus, counteracts the influence of the plaintiff's apparatus and causes the desired effects not to be produced. This seems to justify the above mode of expression, and is at the same time broadly analogous to the case of running water.



The general idea of Responsibility seems to involve in Anglo-American law three main notions:—

1. *Causation.* We find, first, a fundamental notion that the defendant must have *caused* the harm in question. This is to-day almost axiomatic; although in primitive and mediæval times many kinds of connection, short of causation, sufficed to fix liability. The superstitious attitude of the period made accursed the man and the thing by whom the offence came, whether in strictness it was or was not caused thereby.<sup>1</sup> The accepted ethical axiom of to-day, causation, rarely gives rise to legal difficulty in its application, except in one or two cases commonly treated under the law of Damages, *e. g.* whether a particular disease was caused by a carrier's negligence or by a surgeon's bungling, whether a loss of business profits was caused by alleged unlawful conduct or by external events, etc. A special problem is presented where several wrong-doers have co-operated and the apportionment of Responsibility to the real source is necessary; as where dogs of several persons combine in worrying sheep. Usually the knot is cut in Alexandrine fashion; as where the liquor-damage statutes provide that, during the period of disability of a father by intoxication to support his family, any liquor-seller furnishing liquor during that time shall be liable; or where the common-law principle makes any one of joint tort-feasors liable for the whole damage.

2. *Activity.* Next we find a cardinal principle (not without exceptions) requiring that the person to be made responsible must be fixed with an initiating act or activity, an exercise of volition, remote or near, without which he cannot be brought to bar. This is the broader phase of the well-known principle that an action of tort does not lie for a mere nonfeasance. All the harm in the world may come to X, but Y cannot be made responsible unless we can fix upon him some active interposition.<sup>2</sup> Thus, one who,

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<sup>1</sup> See the article in 7 HARV. LAW REV. 315 ff.

<sup>2</sup> It is a common error to suppose that "negligence," as the source of culpability, involves often or usually a mere omission, a not-doing as distinguished from positive doing in a careless way. But all negligence, in Torts, is founded ultimately on a doing an action. If the source is in appearance an omission, as where an engineer fails to ring the bell or to keep a lookout, it is reducible to a mismanagement, an improper doing. Speaking accurately, the term "negligence" expresses merely the relation between this original act and the harmful consequence, *i. e.* the probability of the harm; and therefore the culpability consists in putting one's hand to the deed (thus always an Action) in the face of this probability of harm. Mr. Justice Holmes has pointed this out long ago (Common Law, pp. 152, 161): "In all these cases it will be found that there has been a voluntary act on the part of the person to be charged. . . . It is

as in Bentham's well-known illustration, sees a man drowning and with power to save him fails to do so, or, as in the Roman Law glosses, sees an absent neighbor's windows open and perceives without preventing the deluge of the exposed rooms by a rain-storm, may stand idle and laugh with civil impunity at the harm which ensues. So also, one who is unwillingly carried upon another's land is not guilty of a trespass. We may or may not quarrel with this morality, but the notion is now a racial feature of our legal system. The application of it gives rise to little dispute, but there are one or two exceptions of policy which are to be noted. (1) The possession or ownership of real property often fixes a responsibility for harm where not a hand has been lifted by the defendant; thus, one who acquires land on which is a noisome pond or a tottering building may become responsible for harm caused thereby. Incidentally the distinction between owner and occupier may come into play. So also statutes fix civil responsibility upon municipal corporations for defective ways, etc., and statutes sometimes make the owners of buildings liable for disability caused by the sale of intoxicating liquors therein, though no active initiation can be brought home to the defendant. (2) There is perhaps a disposition to put a criminal responsibility upon those who by nonfeasance allow others to suffer bodily harm, where the circumstances place the defendant in a peculiar relation, — as where a brother allows a sister in the same house to starve.<sup>1</sup> But whether a civil responsibility should be imposed is not yet answered in the affirmative.

3. But one is not made responsible even for every harm actively caused by him. To quote Mr. Justice Holmes again: —

"If running down a man is a trespass when the accident can be referred to the act of spurring, why is it not a tort in every case, as was argued in *Vincent v. Stinehour*, seeing that it can always be referred more remotely to his act of mounting and taking the horse out? The reason is that if the intervening events are such that no foresight could have been expected to look out for them, the defendant is not to blame for having failed to do so. . . . If this were not so, any act would be sufficient, however remote, which set in motion or opened the door for a series of physical consequences ending in damage. The requirement of an act is the requirement that the defendant should have made a choice. But the only

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necessary that he should have chosen the conduct which led to the harm. . . . The philosophical analysis of every wrong begins by determining what the defendant has actually chosen, that is to say, what his voluntary act or conduct has been."

<sup>1</sup> *R. v. Instan*, L. R. '93, 1 Q. B. 450.

possible purpose of introducing this moral element is to make the power of avoiding the evil complained of a condition of liability, . . . to give a man a fair chance to avoid doing the harm before he is held responsible for it. . . . Accordingly it would be possible to state all cases of negligence in terms of imputed or presumed foresight."<sup>1</sup>

The phrasing and the application of this third element give rise to the greater part of litigation in this field. The general question is, Where shall the line be drawn to express that relation between the defendant's conduct and the harmful consequence which fairness and policy regard as completing civil responsibility? Observe that it is a question of a *relation*. From the defendant's point of view, we are apt to speak of his "negligence;" from the standpoint of the harm done, we are apt to speak of a "natural" or "probable" consequence. But both of these terms, properly understood, are relative; at whichever standpoint we take, the harm must be viewed with reference to the conduct, and the conduct with reference to the harm. The further grouping of classes of cases under this head, with reference to the help to be gained by treating similar questions together, is an interesting subject, but one for which space does not here suffice.

4. (a) The general principle of the preceding paragraph (3) — which we may call *Normality*, a term expressing the leading idea common to "natural," "probable," "ordinary," and the other words — suffers an important variation in a large group of cases, in which the defendant is said to act at his peril. Here it is no longer left as an open question for the jury whether the harm in question was the "natural and probable" or normal consequence of the defendant's conduct. The courts may declare once for all that certain harms are always to be regarded under certain circumstances as the normally apprehendible consequences of certain conduct; hence, given the conduct and the consequence, and the defendant is responsible without further inquiry. This is therefore, after all, not so much a variation from the principle of Normality as a permanent reduction of the general principle to specific rules for specific cases. As Mr. Justice Holmes puts it: —

"There are also many cases in which the teaching of experience has been formulated in specific rules. . . . There is no longer any need to refer to the prudent man or general experience. The facts have taught their

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<sup>1</sup> Common Law, pp. 92, 95, 144, 147.



lesson, and have generated a concrete and external rule of liability. He who snaps a cap upon a gun pointed in the direction of another person known by him to be present is answerable for the consequences."<sup>1</sup>

*First*, in grouping these rules, we find a number of miscellaneous cases determined by the courts from time to time. With reference to certain harms, the keeping of dogs, cattle, and other animals, the storing of explosives, the use of weapons, and other sorts of conduct, have been declared to be to some extent governed by this test. But the important thing to notice is that such rules *may* be formulated for responsibility for every kind of legal harm. In trespass and conversion, the question whether we walk on land and deal as owners with personalty at our peril; in libel, the question how far, with reference to inadvertent publication, we put defamatory statements on paper at our peril; in loss of service, the question how far we employ another at peril, with reference to a possible existing contract of his, — for all the different kinds of harm the question may come up. These germane questions all throw light upon one another, and their consideration in one place helps us to discuss intelligently the comparative policies of different situations. *Secondly*, we have a principle of limited application that "unlawful" acts — signifying an illegality, usually statutory, independent of the question at issue — are done at peril. The application of this principle is attended with a looseness and a confusion with which we need not here try to deal. (*b*) In numerous cases, also, courts are found ruling that on the facts of case the defendant is guilty of negligence as a matter of law. The difference between this and the preceding form of the principle seems merely to be that the court lays down no general rule for a class of cases, and does not intend to go beyond the complex of facts then before it. But the two forms shade off into each other at a point almost indistinguishable.

This sub-principle of "acting at peril," it must be added, has certain general limitations; and a special group of cases attempt to determine how far extraordinary catastrophes or the acts of third persons relieve from responsibility one who would ordinarily be "acting at peril."

Within these four headings it seems that all genuine questions of Responsibility are included.

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<sup>1</sup> Common Law, pp. 150, 152.

## III.

In the Excuse or Justification element, a general agreement as to the inter-groupings of the various topics has not yet been reached — has indeed been little canvassed. The idea of the following attempt is to ignore superficial resemblances, and to take as the basis of grouping the essential policy of the excuse, — that which gives it character, and explains its varying application by the courts.

To begin with, then, we find three broad groupings. (*a*) We notice that in one group the excuse finds its reason solely in the condition, conduct, or other circumstances of the plaintiff, the one suffering the harm. Excuses resting on the consent, the contributory fault, the illegal conduct, the need of assistance, of the plaintiff are thus characterized, and are governed by considerations more or less associated. (*b*) At the other extreme, we find certain excuses starting from the interest of others than the plaintiff. These include the excuses resting on the needs of public justice, and the excuses resting on the interests of the community in general or of the defendant in particular, defining the limits of competition for commercial profit, the extent of injury by nuisances, etc. The general problem is to determine how far such opposing interests justify the harm done to a plaintiff himself innocent of fault. (*c*) Intermediate, lies a class in which both these elements enter, — being in the main the various limitations called for by the requirements of self-defence and self-redress. Here we find the former element, in that the plaintiff is supposed to be in some way to blame; while the latter element is also present, in that the defendant has by hypothesis some interest of his own to protect; the general problem being in effect to determine the total effect to be given to these considerations.

A. 1. Taking the first general group, we find that Consent (Leave and License) is generally recognized as limiting the right and taking away the claim for harm done. There are, of course, a few exceptions to be marked.

2. Next to a direct consent of the plaintiff to bear a specific harm, we may place that conduct which, in several more or less distinct forms, amounts to the Assumption of a Risk of harm. The three leading varieties are: (*a*) the wilful rushing upon harm, — chiefly the doctrine of avoidable damage, — Contributory Wilfulness, it may perhaps be termed; (*b*) Contributory

Illegality, — as, in certain cases, the violation of a statute; (c) the attitude of one who as a trespasser, or licensee, or employee, may fairly be regarded as assuming certain risks on the premises of others; (d) negligent conduct, almost equivalent in effect to some of these, but less pronounced, — the doctrine of Contributory Negligence. In all of these the effect of the plaintiff's attitude as an Excuse for the defendant is seen to be less pronounced, for it usually does not cover harms inflicted with a certain degree of deliberateness or wantonness. Hence a kind of balancing of the conduct of the parties is in all four often called for, — as in the doctrine of "proximate cause" under Contributory Negligence, or in the failure to excuse, even as against a trespasser, one who "sets traps" for him.<sup>1</sup>

3. Finally, a condition of the plaintiff calling for humane assistance is a circumstance leading to a limitation. Trespassing to save the plaintiff's property or life is said to be in certain cases excusable by "implied license;" but this seems a mere fiction. A sense of the unfairness of the plaintiff's attitude in seeking redress, and the adjustment of this idea to the counter-vailing considerations — the relative harm done and prevented by the defendant, the possibilities of abuse of privilege, etc. — are the real motives supporting the few rules that we have for this topic.

B. Taking next the intermediate group of limitations (lettered *c* above), we find that, with one exception, it is made up of the various forms of Self-redress and Self-defence.

1. To get the benefit lying in the comparison of related situations and the transition from one aspect of policy to the next, the topics may be considered in this order: (1) Defence of one's own person; (2) Defence of another's person; (3) Defence of personalty; recaption of personalty; (4) Defence of realty; repossession of realty; (5) Abatement of a nuisance. Different policies may conceivably prevail for the defence of different interests, and different limitations may obtain according as the object is defence or recaption. Furthermore, within each topic we may consider in order what sort of harms — *e.g.* a battery, an imprisonment, a

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<sup>1</sup> The generic feature of the principle of Contributory Fault or Assumption of Risk is seen in that the question may arise in excuse for other harms than a corporal injury, — as where one by his own conduct precludes himself from suing for the seduction of his daughter or the alienation of his wife's affection, or where the author of an immoral book claims protection, or where mutual unbridled recrimination in a neighbors' quarrel prevents either from recovering against the other.



trespass to property, etc. — may be inflicted for defending the particular kind of interest in hand; for the law may well license one and stop at another. By such a grouping, it would seem, an opportunity is gained for distinguishing and comparing various shades of policy and detecting their effect, if any, in the concrete rules.

2. Akin to the preceding topics, in that there is involved on the one hand some blame in the plaintiff, and on the other some legitimate interest of the defendant's to be protected, is the subject of Discipline and Correction, — the limitations allowable in favor of parents, teachers, masters, ship-captains, and the like. The arrest and imprisonment of an admitted wrong-doer belongs theoretically here.

C. We come now to the group of excuses which rest upon the needs and interests of others than the plaintiff, — whether of the defendant or of another or of the community in general. We find here a tendency to be chary with excuses where the interests of one person alone, particularly the defendant, are urged, and to be liberal where the community at large is concerned. For a first grouping, a distinct separation can be made of those limitations which rest specially upon the needs of the administration of justice; the remainder form a second group.

I. The *requirements of the administration of justice* offer room for conceivable differences of policy according as the person who is responsible for the harm is (a) a party litigant claiming the enforcement of a right, (b) an officer of justice, or a person acting as such, proceeding in the interests of justice. (a) Here we discuss the limitations available in excuse for an arrest, attachment, or other legal proceeding causing harm to an innocent plaintiff, and usually treated under the action for malicious prosecution, attachment, etc. When we have here a conceded harm and a conceded responsibility, it seems clear that the remaining question is as to the proper limitations — reasonable cause, etc. — within which one may with impunity inflict such harm while claiming to enforce his rights. (b) The policies here involved lead us to a further grouping according to the injuries committed. (1) Where an injury to person or to property is involved (arrest, attachment, etc.), there are first to be considered the limitations in favor of one arresting (with and without a warrant),<sup>1</sup> or attaching, including the protection allowable

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<sup>1</sup> Under this head we treat also of private persons making arrests, because the protection given them rests on the general requirements of justice, not on their private

under defective writs, and the doctrine of trespass *ab initio*; then the limitations in favor of a judicial officer, as to whom a policy of greater liberality may prevail, and as to sundry officials having authority of a mixed nature. (2) Where the injury involves a defamation, we have to consider the respective privileges of the judge, the pleader, the witness, and finally the reporter of the proceedings; for it would seem that the protection of "fair reports" rests peculiarly on the special needs of the administration of justice.

2. Coming now to the excuses resting on miscellaneous requirements of external interests, we again find the general problem to be the degree of consideration to be given to those interests weighed against the harm done to individual innocent plaintiffs, and the results naturally differing according to the kind of harm involved.

(a) Injury to property by trespass. Whether an intrusion is justifiable to avoid inconvenience or to save one's life; whether buildings or merchandise may be destroyed to stop a fire; — these examples indicate the sort of problem involved. The bearing of the admiralty principle of jettison is not always recognized. The question is not always kept separate from a distinct one, the quasi-contractual right to compensation for harm thus lawfully inflicted. (b) Nuisances. The extent to which one may with impunity annoy and injure another by nuisances of smoke, etc., depends on the proper limits to be allowed to the necessities of the community in industrial and other activities, as balanced against the respect due to individual convenience, — as the decisions show.

(c) Interference with game, with running water, with electricity. Here, again, the policy of regarding the reasonable requirements of others is applied in special sets of circumstances.

(d) Copyrights and patents. Here the interests of the community find consideration (apparently) in the time limitations which throw open the invention to the public after a period sufficient to repay authors and inventors and sufficiently stimulate creative effort.

(e) Defamation. Here the policy receives application in two leading doctrines: (1) Communications in the protection or vindication of a legitimate interest of an individual or of a special

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interests of redress (for the law is the same whether the arresting citizen be the very one harmed by a theft, etc., or a third person); though to guard against abuse the limitations may well be, and are in part, stricter than for a commissioned officer.

body — certain statements about employees, reports to stockholders or to subscribers of a commercial agency, charges against a municipal officer, etc. — call for an adjustment of the limits allowable to such self-seeking efforts; the doctrine of malice is incidentally involved. (2) In the interests of the community at large, a certain freedom of criticism, not as liberal as in the preceding class of cases, is to be permitted in matters of literature, public behavior, etc.; a similar policy being involved.

(f) Injuries to societary relations. Mr. Justice HOLMES has lately shown<sup>1</sup> how the general question here is one of the proper limits allowable to the needs of industrial competition and of general social intercourse, with reference to the harm to individuals therein necessarily involved. The grouping, for this purpose, into (1) Domestic, (2) Contractual, and (3) Sundry Voluntary relations has already been explained. It is unnecessary here to suggest the different detailed problems that arise, except to call attention to the smaller degree of liberty allowed for interference with the more solid and definite relations of the first two classes as compared with the third. In the third class we find, on the whole, a general agreement, on the one hand, to make no allowances in favor of violent, fraudulent, or defamatory interference, and on the other, to exempt from action any peaceable individual suasion. Between these extremes the principles are as yet being worked out, the problem being to adjust the conflicting requirements of the general social needs and of individual security, and to define the place where the former shall not be allowed to override the latter.

It must be again noted that these different policies of Excuse, above rehearsed, may apply to any of the legally recognized harms. The doctrine of consent or of assumption of risk, the needs of the administration of justice, the requirements of social convenience, may or may not justify a trespass, a slander, a nuisance, a boycott. Not every form of Excuse, of course, is applicable to each kind of legal harm; but each form of policy exists for itself and not in yoke with a specific kind of harm, though its result, when applied to different harms, may not be the same. This seems to show that the natural line of cleavage is a horizontal rather than a vertical one, that the general grouping should be not *e. g.* (1) Battery, (2) Responsibility for it, (3) Excuses for it, and so on for other kinds of harm, but rather (1) Harm in general, the varieties; (2) Responsi-

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<sup>1</sup> 8 HARV. LAW REV., pp. 1-14.



bility in general, its elements; (3) Excuse in general, the varieties. This is the fundamental proposition of which this article is intended to be an exposition. The unity in variety of policies and principles according to the latter grouping seems to indicate it as the fruitful one, — from the point of view of the jurist at least, though at present not so clearly from that of the index-maker or the practitioner.

A few words in conclusion.

1. It will be seen that the writer does not believe in that theory of Tort-right which makes it merely a right to recover compensation for a harm done. The theory here accepted is that of a right to have certain harmful results not produced; and, though the remedy (or means of realization of the right) is usually compensation and not specific prevention, that is a matter of remedial law and policy, and does not touch the nature of the substantive right-and-duty.

2. "False Representations" has not been made a title in the preceding exposition because the writer believes, with others, that it is, like some parts of Estoppel, akin in essence to the general subject of Undertakings (including contracts).

3. The writer expresses no opinion as to whether it is possible or desirable to follow the above order of topics in conducting instruction in Torts.

4. The effort has been in reaching the above results to proceed inductively. The writer will be glad to receive word of instances which seem not to harmonize with the analysis here set forth. The revision and correction of inductive results must always be necessary where there have been errors of analysis or omissions of significant instances, and it cannot be hoped that the above exposition is not subject to correction.

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## LEASE OF RAILROAD BY MAJORITY OF STOCKHOLDERS WITH ASSENT OF LEGISLATURE.

[Continued from 8 HARVARD LAW REVIEW, page 316.]

ANY and all of the corporate powers granted to the stockholders by the State can be taken from them by the grantor. The rescission of the entire grant, or any part of it, may be unconditional. A repeal of the provision that the stockholders may sue and be sued as one person would impose upon them and the public an inconvenience that would be serious, if it could not be mitigated by the company or the common law. A repeal of the requirement that the stockholders shall choose seven directors would remove a disability, and enable the stockholders to exercise the common-law right of agreeing upon an election of any number of directors or none. It is not for the grantees to say that the revocable grant shall not be amended. A legislative revocation of granted powers may be accompanied by a proviso that the grantees may retain them in a modified form. This is merely saying that the grantor can grant, and the grantees can accept, new powers instead of the old ones. The principle is the same whether the new powers are substitutes or additions. Without acceptance, they cannot become the powers of the grantees. An Act repealing the Northern charter, unless the stockholders accept a new power of leasing the road, would enable an objecting owner of one share to injure himself, and the other stockholders, and the public. The expediency of refusing to take the objector's share by an easy and harmless legal process that would pay him for it, is not a judicial question. If an amendment of the charter law can authorize a conveyance of one stockholder's share of the property by a lease for ninety-nine years, without his consent, and without prepayment of the value of his share, another amendment of the same law can convey all the property to a bankrupt and his heirs and assigns forever, without the consent of any of the owners, without payment of anything at any time, and without any security for payment. If either amendment would be an exercise of legislative power, no private property, real or personal, can be leased, loaned,

or sold by its owner until an amendment of the Constitution gives him a portion of the legislative power now vested in the Senate and House.

A manufacturing company having been incorporated in 1833, a statute of 1839 made the stockholders liable for corporate debts contracted after its passage, and a stockholder was held liable for a debt contracted in 1841.<sup>1</sup> The court say, "If the corporators were not satisfied with their individual liabilities, . . . they had it in their power to cease incurring them." The partners could alter their charter contract of partnership by continuing in business after the law of individual liability was changed by the Act of 1839. They could avoid an alteration of that part of the contract relating to liability by winding up the company. One of them, objecting to the alteration of his agreement, would be entitled to an injunction against the contraction of debts, or a legal process of dissolution, or some other adequate protection. None of them could prevent the change of the charter law on the subject of individual liability, and none could be compelled to become liable under a new law.

In 1846, a revocable power of New York banks to issue bank notes was conditionally revoked. The condition was that if any bank continued to issue notes after January 1, 1850, the stockholders should be individually liable, to a certain amount, for corporate debts contracted after that date. Time was given "to enable the proprietors of existing banking institutions to determine whether they would remain banks of issue, and assume the burden of individual liability, or avoid that consequence by winding up their affairs, or confining themselves to other branches of banking." All the stockholders of a bank, by continuing to issue notes after January 1, 1850, accepted the condition as an alteration of their contract.<sup>2</sup> In such a case in this State, a stockholder, seasonably objecting, would be entitled to an injunction against a continued issue of notes by his firm that would materially alter the partnership agreement concerning liability.

In *Union Locks & Canal v. Towne*, the amendatory legislation of 1809 and 1812 was an additional grant of corporate power to the company. The provision of § 17 of the Act of 1883 that "any railroad corporation may lease its road" is an additional grant of corporate power to the Northern Railroad

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<sup>1</sup> *Stanley v. Stanley*, 26 Me. 191.

<sup>2</sup> In the matter of *O. L. Bank*, 21 N. Y. 9.



Company. In each case, the acceptance of the additional grant would be a material alteration of the charter contract of partnership. In each case, the additional as well as the original grant, like an ordinary deed of land, power of attorney, or official appointment, is permissive, not obligatory, and has no effect until accepted. The stockholders' acceptance of the leasing power granted to the Northern Railroad in the Act of 1883 would have the same effect as their acceptance of the same power if it had been granted in their Act of incorporation. By becoming a member of the company, every stockholder accepts the charter-grants of 1844. As the plaintiffs have not accepted the grant of 1883, and have not authorized their agents to accept it for them, the corporation, of which they are a part, have not accepted it. It can be accepted directly by a unanimous affirmative vote on the general question of acceptance. A unanimous vote in favor of a particular lease would be a bar against a stockholder's contesting that lease on the ground of a want of leasing power, and might be claimed to be an indirect general acceptance. Had the leasing power become one of the corporate powers by acceptance, it could be exercised, at any time, "upon such terms and for such time as may be or may have been agreed to by the directors, and as may be or may have been approved by two-thirds of all the votes cast on that subject by the stockholders," according to the express provision of the grant. As the directors and two-thirds of the stockholders voting on the question of acceptance are not the corporation, but only a part of it, and can have no other power than that of agents to act for anybody but themselves, the construction that the leasing power, granted to the company, can be accepted for the company by the directors and two-thirds of the voting stockholders, would make the grant a legislative attempt to give the company's agents a leasing power over the corporate property and business which those agents cannot give themselves, and which their principals have not given them. The only conclusion in favor of this construction is that the power of giving any agents any control over their principals' property or business is legislative in its legal character, and, being legislative, can be exercised by nobody but legislators in whom the Constitution vests it. And this would fall far short of the whole conclusion. An agreement of two parties, giving one of them authority to act for the other, is but one of an infinite number of possible contracts. If the power of making a contract of agency between these plaintiffs and

other stockholders is legislative, all contractual power is legislative. A decision sustaining this lease would change the private right of making contracts into a public right, take it from all private companies and private persons who now have it, and bestow it exclusively upon those who have the constitutional power of making law.

The contract made by the stockholders of the Union Locks & Canal with each other, and by the stockholders of the Northern Railroad with each other, and written in the charters of those companies, could have been so written as to authorize the directors, or a majority of the stockholders, or two-thirds of them, or each of them, or one of them specially designated, or any other person, acting as agents or agent of the company, to take the company, with the State's permission, into any and all business that men are capable of doing. In neither case is there such a contract, express or implied. In neither case is there a stipulation, express or implied, that a majority, or any other part of the company, may put the shares of the rest into any business except that specifically described in the contract, and any other that comes within the incidental power of doing what is reasonably necessary to enable the company to do that business.

In the present inquiry, it is not material whether the effort of a partnership majority to alter the partnership contract is made directly and in express terms, or indirectly by an acceptance of corporate power. A vote of the majority of the Farmers' and Mechanics' Store accepting a charter authorizing the firm to buy and sell ardent spirits, would have been as unavailing against the twelfth article, as the vote amending that article without an Act of incorporation. A material alteration of the partnership contract of the Northern Railroad effected by an acceptance of corporate power, or in any other way, being an exercise of authority which that contract does not confer upon the majority, is not validated by circuituity of method. "The directors of the Northern Railroad, and two-thirds of the voting stockholders of that company may accept, for themselves and the other stockholders, the grant of leasing power hereby made to that company." Such a clause, in the Act of 1883, would have been inserted on the theory that the directors and two-thirds of the voting stockholders were thereby made State agents whose services could be dispensed with by enacting that "The leasing power, hereby granted by the State to the Northern Railroad, is hereby accepted by the State for that company." Either clause

would present the claim that all contractual power, including the right to make and alter partnership agreements, is legislative, and therefore, in every valid contract, the State is both parties.

"It is an admitted principle that in partnerships and joint stock associations, they cannot by a vote of the majority change or alter their fundamental articles of co-partnership or association, against the will of the minority, however small, unless there is an express or implied provision in the articles themselves that they may do it. . . . It is conceded that there is a class of alterations in a charter which the corporation may obtain and adopt, that would not so essentially change the contract as to absolve the corporator from his subscription, or give him a right to complain in a court of justice, in case he had previously paid it. Where the object of the modification or alteration of the charter is auxiliary to the original object of it, and designed to enable the corporation to carry into execution the very purpose of the original grant, with more facility and more beneficially than they otherwise could, the individual corporator cannot complain; and I should apprehend it would make no difference with the rights of a corporation, in such a case, though he could show that the charter, as amended, was less beneficial to the corporators than the original one would have been. The ground upon which such amendments bind the corporator, I deem to be his own consent. When he becomes a corporator by his signing for a portion of the capital stock, he in effect agrees to the by-laws, rules, and votes of the company, and there is an implied assent, on his part, with the corporation, that they may apply for and adopt such amendments as are within the scope, and designed to promote the execution, of the original purpose. . . . The consent or assent may . . . be implied where the amendment is not regarded as fundamental, and can be brought within the scope of the original purpose of the association. . . . It is not necessary that the business should be changed in kind to change the original purpose. If this [a railroad extension of thirty miles] is not a change in purpose, it would not be to extend the road in one direction to Canada line, and in the other to Massachusetts line."<sup>1</sup>

The proposed extension was held to be a change of the original purpose, and a violation of the stockholders' contract. The statement, in the opinion, that the majority may obtain and adopt an amendment of the charter making any change in the minority's con-

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<sup>1</sup> *Stevens v. R. & B. R. R. Co.*, 29 Vt. 545, 550, 554, 555.



tract that is not essential or fundamental, is explained by the context. As explained, it means not that the majority can thus make a change in the contract that would be a violation of it, but that when the company need the State's assent to corporate action that is within the express or implied power of doing what is necessary to carry into effect the specified purpose of the contract, the majority may apply for and accept an amendment giving such assent, — in other words, the majority may accept a legislative increase of the legislative grant of corporate power that will enable the company to perform the stockholders' contract.<sup>1</sup> Under this exposition of amendments that are not essential or fundamental, their legal effect and practical utility need not now be considered. Whatever explanations the statement concerning them may require in the various forms in which it occurs in the books, it cannot divert attention from the central point of inquiry. Under all versions of sound doctrine, the question in this State is whether the change which the majority propose to make in the corporate business against the objection of the minority, is a performance of their contract, or a violation of it, and not whether, in fact, the violation will probably be beneficial, nor whether, in fact or in law, it is so small or so enormous as to be approved or condemned by an arbitrary and boundless discretion. On the facts of this case, a leasing violation of the minority's legal right, however beneficial to them, is a legal cause of action on which they are entitled to judgment in some form of action.<sup>2</sup>

"A corporation like a partnership is an association of natural persons who contribute a joint capital for a common purpose. . . . Changes in the purpose and object of an association . . . are necessarily fundamental in their character, and cannot, on general principles, be made without the express or implied consent of the members. The reason is obvious. . . . The purpose and object . . . may be said to be the final cause of the association, for the sake of which it was brought into existence. To change this without the consent of the associates, would be to commit them to an enterprise which they never embraced, and would be manifestly unjust."<sup>3</sup> The retire-

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<sup>1</sup> *Hanna v. C. & F. R. Co.*, 20 Ind. 30.

<sup>2</sup> *Johnson v. Conant*, 64 N. H. 109, 136.

<sup>3</sup> *Railroad Co. v. Allerton*, 18 Wall. 233, 235. Compare *Lauman v. Lebanon Valley R. R. Co.*, 30 Pa. St. 42; *Clearwater v. Meredith*, 1 Wall. 25, 39, 40, 41; *Nugent v. Supervisors*, 19 Wall. 241, 248, 249; *Railroad Co. v. Georgia*, 98 U. S. 359, 364; *Sargent v. Webster*, 13 Met. 497, 503, 504; *Treadwell v. Salisbury Mfg. Co.*, 7 Gray, 393, 394, 397, 398, 404, 405.

ment of the Northern company from the industrial activity of common carriers to the leisure of mere rent-receivers was a change in the object of the partnership. The legal character of the change did not depend upon the circumstance that the partners never intended to perform all their mental and manual labor in person. The labor now done and the tolls now received on the road are not theirs.

" . . . Because the corporators may, with the consent of the State, by the vote of a majority of two-thirds in interest, abandon their enterprise, sell out their property, and return his share of the proceeds to each stockholder, it does not follow that by the same authority the works may be leased to be carried on and conducted by others, the corporation continuing to exist. The right to elect the directors, by whom the business is to be managed, is a provision in the charter which the State or a majority cannot interfere with; it is a contract. The true question on that point here is whether the making of this lease and contract is an exercise of the power of managing the business and concerns of the corporation conferred in the charter, such as can be used by consent of a legal majority of corporators, without that of all."<sup>1</sup>

"The certificate for stock declares that the holder is entitled to a certain number of shares of the capital stock, which consists of the corporeal works and property, with valuable franchises to be used by the corporation for their profit, by the taking of tolls and fares, with the right to acquire and dispose of such property as may be essential in the legitimate exercise of their functions, under the management and control of directors, of whom any corporator, by and with the consent of the requisite number of his associates, may be one. The prospect of increased gains, consequent upon the growth of population and added business, is a valuable incident also to the ownership of the stock. Such are the rights vested in the stockholder under the law, and by virtue of his engagement with his associates, before the lease is effected. After the lease takes effect, his company is denuded of all these corporeal, substantial properties, its structure for the next 999 years is totally altered, and instead of what he before possessed, he would be compelled to accept an annual rent. . . . The shareholder would still have the paper upon which his certificate is printed, but in place

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<sup>1</sup> Zabriskie, Chancellor, in *Black v. Co.*, 22 N. J. Eq. 130, 407. (See also 22 N. J. Eq. 405, 408, 415, 416; and *Zabriskie v. Hackensack & N. Y. R. R. Co.*, 3 C. E. Green, 183.)

of the earnings, he must be content with a share of the reserved rental in a corporation possessed of the single faculty of maintaining its organization for the distribution of such rent, stripped of all the franchises for the exercise of which it was founded. Without his consent, and against his protest, he would lose his share in the old thing, and be forced . . . into a new and wholly different venture. . . . For all substantial, practical purposes, a lease for 999 years is a conveyance in fee."<sup>1</sup>

"From the conclusions thus far reached, does it result that one unwilling stockholder may obstruct the growth and development of every enterprise of this character in which he may have participated, and thus hinder the union under one management of these important public highways which have been constructed at different periods and under separate charters, when the necessities of interstate commerce, and the convenience of public travel, may unite in urging it? Shall a railroad from Philadelphia to Trenton never be extended so as to connect the two great cities of our Union, while one obstinate associate stands in the way? . . . In the exercise of the right of eminent domain, the Legislature may authorize shares in corporations, and corporate franchises, to be taken for public uses upon just compensation."<sup>2</sup>

In *Mills v. Central R. R. Co.*,<sup>3</sup> under an alterable and repealable charter, and a subsequent statute authorizing all railway companies to lease their roads, a lease of the Central was held void on the ground, stated in *Black's Case*, that the corporate business could not be radically changed by the majority, and the ground, stated in *Zabriskie's Case*,<sup>4</sup> that the power of amendment and repeal was a power reserved by the State to modify and rescind the grant it had made, and not to authorize one part of the corporators to make radical changes in violation of the agreement of all.

The extension of the Old Colony Railroad from Fall River, in Massachusetts, to Newport, in Rhode Island, authorized by the Legislature and a majority of the stockholders, was held to be legal because the business to be done in Rhode Island was of the same kind as that done in Massachusetts.<sup>5</sup> The company would be a railway common carrier in both States. The court suggest

<sup>1</sup> Van Syckel, J., in *Black v. Delaware & R. Co.*, 24 N. J. Eq. 455, 464, 465.

<sup>2</sup> Van Syckel, J., in *Black v. Delaware & R. Co.*, 24 N. J. Eq. 455, 468. (See also 24 N. J. Eq. 463, 466, 467, 485.)

<sup>3</sup> 41 N. J. Eq. 1.

<sup>4</sup> 18 N. J. Eq. 178, 185.

<sup>5</sup> *Durfee v. Old Colony R. R. Co.*, 5 Allen, 230.



that a limit of the legislative power of amending the charter, even with the consent of the corporation, might perhaps be found in the doctrine that the corporate powers cannot be extended to enterprises or operations different in their nature and kind from those comprehended in the original charter.<sup>1</sup> As each stockholder, by taking a share under an alterable charter, assented to an exercise of the entire legislative power of alteration, the doctrine of the Old Colony Case is that he assented to an amendment authorizing the company to extend their road by connecting it with, and becoming lessees of, all similar roads, and taking assignments of all human business "of a nature similar to" that "embraced within the original grant of power." After the company had exhausted its power of expansion within the limit of similarity, this doctrine of the enlargement of one kind of business, if sound, would not sustain a legislative amendment authorizing the company to transfer all its possessions by a lease under which the lessee would take the place of the lessor in the lessor's common-carrier business. As that would be all the business of that kind in the world, the subsequent business of the lessor would be of a different kind. A leasehold extension of the Old Colony, leaving that company for a short time in the business of a common carrier on its original track between Boston and Fall River, followed by its transfer of that track to a lessee for ninety-nine years, would illustrate the difference between taking a lease and giving one. A legislative power of authorizing a majority of the stockholders to make leases, as well as accept them, would be based on the theory that each subscriber, by taking a share of stock and paying one hundred dollars to be used in building and operating a railroad from Boston to Fall River, agreed not only that he might be embarked in the operation of that and all other railroads, but also that he might be thrown out of the carrier business of the road he helped to build, and exposed to the risks of all the railway investments of mankind, except the one for which he subscribed. "The power of the proprietors, acting by a majority, . . . is limited to matters properly embraced within the purposes for which the corporation was created."<sup>2</sup>

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<sup>1</sup> Page 247.

<sup>2</sup> *In re* N. S. Meeting-house, 13 Allen, 497, 510. [Contrast *Dorris v. Sweeney*, 60 N. Y. 463, with *S. & S. P. R. Co. v. Thatcher*, 11 N. Y. 102; *Buffalo, &c. R. R. Co. v. Dudley*, 14 N. Y. 336, 348, 349, 355; and *Union Hotel Co. v. Hersee*, 79 N. Y. 454, 458.]

"The original charter conferred upon the company all the usual and necessary powers for locating and constructing a railroad from the town of Hartford to the city of New Haven. The ten shares subscribed for by the defendant were expressly taken upon 'the terms, conditions, and limitations' mentioned in the charter. And such would doubtless have been the legal effect of the subscription, had no reference to the charter been made in it. . . . Since entering into this contract, the plaintiffs have procured an amendment of their charter, by which they have superadded to their original undertaking a new and very different enterprise. . . . Instead of confining their operations to the construction and management of their railroad between Hartford and New Haven, they have undertaken to establish and maintain a line of . . . steamboats. . . . It is most obvious, if incorporated companies can succeed in establishing this sort of absolute control over the original contract entered into with them by the several corporators, there is no limit to which it may not be carried short of that which defines the boundary of legislative authority. The proposition is too monstrous to be entertained for a moment."<sup>1</sup>

"That case," says Selden, J., in *B. & N. Y. R. Co. v. Dudley*,<sup>2</sup> "is in direct conflict with several English cases." Parliament having authority to make any person a member of any incorporated or unincorporated partnership without his consent, and to make any alteration in his helpless condition, and the question in English courts being merely whether Parliament intended to exercise this non-legislative power, the decisions of that question are inadvertently cited in a manner that tends to throw doubt upon all constitutional security of private rights, and to countenance the idea that the people of New York are living under a government as absolute as the one they cast off when they ceased to be subjects of Great Britain.

Cases in which a construction is given to the exercise of the unlimited power of Parliament, without occasion to consider the legal nature of legislative power, and without regard to the question whether the absolute sovereignty exercised in a particular instance is legislative, judicial, or executive, or neither, have a tendency, so far as they are followed in this country, to obliterate an essential feature of American government, and to re-establish the arbitrary dominion that was extinguished in this State by the

<sup>1</sup> *H. & N. H. R. Co. v. Croswell*, 5 Hill, 383, 385, 386.

<sup>2</sup> 14 N. Y. 336, 355.

Constitution.<sup>1</sup> The argument from British precedent begs the question of legislative authority, and takes it for granted that the people of New Hampshire, who went through the Revolution for rights of life, liberty, and property which they considered natural, essential, and inherent,<sup>2</sup> proceeded deliberately, at the close of the struggle, to set up a government as despotic as the one they overturned. The argument proves too much. If it had any force it would show that the members of the Senate and House, by amending wills, conveyances, and laws, can transfer to themselves all property, public and private, that is subject to their legislative control.

The usage of the American Colonies and States before the adoption of constitutional limitations, has been a misleading precedent. In *Rice v. Parkman*<sup>3</sup> (decided in 1820), a legislative resolve, passed in 1792, had authorized A to sell and convey the real estate of B and C. Of this resolve the court said: "It is not legislation, which must be by general acts and rules, but the use of a parental or tutorial power for purposes of kindness." "The only object of the authority granted by the Legislature was to transmute real into personal estate for purposes beneficial to all who were interested therein. This is a power frequently exercised by the Legislature of this State since the adoption of the Constitution, and by the Legislatures of the Province and of the Colony, while under the sovereignty of Great Britain, analogous to the power exercised by the British Parliament, on similar subjects, time out of mind." Under the non-legislative reign of Parliament, and the pre-constitutional government of this State, there was no limit of governmental power to be decided or considered by the court. The Acts of banishment and confiscation passed and enforced by the provisional government of the Revolution<sup>4</sup> were as valid as the *Habeas Corpus* Act.<sup>5</sup> If, upon true construction, not modified by usage, the Massachusetts Legislature of 1792 could authorize A to make the conveyance that was upheld in *Rice v. Parkman*, they could make the conveyance without delegating their authority, could sell A's property without his consent, or authorize B and C to sell it, and can act as guardian and absolute sovereign in all cases in which they choose not to employ agents in their

<sup>1</sup> H. R. Co. v. Brand, L. R. 4 Eng. & Ir. Ap. Cases, 171, 196.

<sup>2</sup> Bill of Rights, Art. 2.

<sup>3</sup> 16 Mass. 326.

<sup>4</sup> Acts of Nov. 19 and 28, 1778, Belknap, Hist. N. H., ch. 26.

<sup>5</sup> *Atherton v. Johnson*, 2 N. H. 31, 34; *Thompson v. Carr*, 5 N. H. 510; *Gould v. Raymond*, 59 N. H. 260, 272-275; *Jackson v. Stokes*, 3 Johns. 151.



unlimited control of property and its owners. And if, in addition to the powers of eminent domain, taxation, and police, the Senate and House have a general power of conveying what the State does not own, they can lease any railroad on any terms to whom they please, and dispose of any private property as they see fit, can transfer all real and personal estate to one man, or make an annual distribution of it, or enact a universal community of interest in it, and leave it, in common and undivided, to be used by the strongest. On the question of power, English precedent and the pre-constitutional practice of this country establish either boundless despotism or nothing.

In Massachusetts, as well as in New Hampshire, the law-making branch of government did not wholly abstain from non-legislative Acts after the adoption of the legislative limitation. In this State, the Senate and House continued to grant new trials until 1817.<sup>1</sup> The same practice, continued in Massachusetts after the adoption of the State Constitution, is now held to be illegal.<sup>2</sup> But the continued exercise of the non-legislative and unlimited power of Parliament and the pre-constitutional government of Massachusetts, in the conveyance of property not belonging to the State, was held legal in *Rice v. Parkman*, which has become a leading case.<sup>3</sup> The contrary doctrine has been settled here sixty years.<sup>4</sup> If the property of incorporated or unincorporated partners can be leased for ninety-nine years without the owners' consent, it can be sold without their consent. In Massachusetts and other States, the legislative power of selling private property for the owners' benefit is a survival of the consolidated form of government that enabled parliament and the colonial assemblies to disregard the difference between making law and administering it. When one sale of such property is ordered by a judicial decree,<sup>5</sup> and another sale of the same kind and for the same purpose is ordered by a vote of the Senate and House, either the court legislate, or the legislature exercise judicial power. There is usurpation on one side or the other.

If a reservation of the power of amending a general or special Act of Incorporation is a creation, and a conveyance to the legislature, of a non-legislative power of altering a partnership contract

<sup>1</sup> *Merrill v. Sherburne*, 1 N. H. 199.

<sup>3</sup> *Cooley*, Const. Lim. 97-106.

<sup>2</sup> *Quincy Mass. Reports*, 473, n. 17.

<sup>4</sup> 4 N. H. 572, 573, 574.

<sup>5</sup> *Old South v. Crocker*, 119 Mass. 1, 26, 27; *Bamforth v. Bamforth*, 123 Mass. 280; *Petition of Baptist Church*, 51 N. H. 424; *Society v. Harriman*, 54 N. H. 444, 446; *Gray, Perpetuities*, s. 590, n. 3.

authorized by the same Act, the Senate and House, by reservation, can create and acquire the non-legislative power of altering all agreements. "All future contracts, not made under and in accordance with this Act, are prohibited. The power of making a contract under this Act is granted to those only who accept and exercise the granted power with and upon the condition that the contract may be amended by a power hereby reserved and hereby vested in the legislature. This Act shall be a part of every contract; and every stipulation excluding it, and every device for evading it shall be illegal and void. All law inconsistent with this Act is hereby repealed." Such an Act in amendment of the law of contracts would assume, not that partnership and all other private contracts are laws of the land, makable and alterable only by law-makers, but that they are not laws, and can be made and altered by persons who are not legislators, and that the non-legislative power of altering them can be reserved by the Senate and House, and added to the law-making power of those assemblies. The power thus reserved would be appropriately exercised by such acts as these: "A's written agreement to pay B \$10, ten months after date, without security (or with such security only as a court can give by preventing the debtor's diversion of his property from the payment of the debt before it is due, when the threatened and wrongful diversion is found upon a judicial trial), is hereby amended: the debtor shall give security by paying \$1 a month to the trustee of a sinking fund of which the creditor is hereby appointed trustee; but if the debtor chooses to avoid the risks of the sinking trust, he may pay \$1 a month to the creditor as creditor." "B's indebtedness to A, secured by mortgage, is hereby amended: the mortgage is discharged." "C's agreement to pay D \$10 is hereby amended: the debtor shall pay \$100." "The partnership agreement of E, F and G to run a daily coach between Concord and Lebanon is hereby amended: a majority of them may assign all the partnership business to H by a lease of all the partnership property for ninety-nine years." Each of these amendments would be enacted to overcome an objection made by one of the contracting parties to an alteration of his agreement. The amendments would not be valid unless they were law. If they would be law, they could not be made by the contracting parties, and the original contracts and all other agreements not made by law-makers would be void.

In the supposed case of A's unsecured indebtedness, a legisla-

tive amendment requiring him, without due process of law, to give such security as his creditor could obtain for due cause shown in a judicial proceeding, would assume that any judgment which one branch of the government can render after trial, another branch can render without a trial; that each branch can do whatever can be done by either of the others; and that their prohibited union<sup>1</sup> has been effected in a triple form. If the State happened to be the creditor, this amendment would be both a commission issued by the creditor appointing himself judge of his own case, and a judgment rendered by him for the enforcement, not of his legal rights legally ascertained, but of his view of them. A reserved power of amendment that could thus alter a contract of the State, could confer upon any creditor the right of rendering summary judgment against his debtor without trial, and could authorize any debtor to enforce his view of his rights in the same manner.

The supposed amendment of the partnership contract, accompanied by a statutory regulation of the powers of partners under all partnership contracts subsequently made, would mark the distinction between the legislative character of an Act that is general and prospective, and the non-legislative character of one that is special and retrospective. One is an effort to make a contract for E, F and G by altering their agreement, and to bind them by a partnership contract they have not made: the other requires no one to be a partner.

All rights of property are not contractual; and there are other rights besides those of property: but persons of contractual capacity, who are under the necessity of making any purchase, sale, or other agreement, have no rights that cannot be taken from them by statute, if the Senate and House can reserve the non-legislative power of amending contracts. An Act providing that "All rights of property, liberty, and life of every person hereafter making any agreement, may be amended by the legislature," would complete the restoration of despotism. Governments established by agreement can be changed or abolished by agreement: but the government which the legislative, judicial, and executive servants of the State are sworn officially to support, is the limited one established in 1784, and not the unlimited one that was then abolished.<sup>2</sup>

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<sup>1</sup> *Ashuelot R. Co. v. Elliot*, 58 N. H. 451, 452, 453.

<sup>2</sup> *Gould v. Raymond*, 59 N. H. 260, 272-275.



The eleventh section of the charter of the Northern Railroad is, "The Legislature may alter, amend, or modify the provisions of this Act, or repeal the same, notice being given to the corporation, and an opportunity to be heard." If the decision in this case depended on the question of fact whether the company had notice and an opportunity to be heard on the proposed passage of the Act of 1883 (ch. 100), the defendants could be allowed, in some proceeding, to show why that question was not tried at the trial term, and the reasons, if any there are, for a new trial of the case on that point. The view most favorable to the lease is that the requirement of notice and an opportunity to be heard was complied with, or was void. The case is decided without any consideration of the effect of the requirement, upon the assumption that it was complied with, and that, for the practical purposes of this case, the performance of the condition gave § 11 the force of an unconditional reservation of the power of alteration and repeal.

"The reservation affects the entire relation between the State and the corporation, and places under legislative control all rights, privileges, and immunities derived by its charter directly from the State."<sup>1</sup> "It was a reservation to the State. . . . The State was making what had been decided to be a contract, and it reserved the power of change, by altering, modifying, or repealing the contract. . . . It was to avoid the rule in the Dartmouth College Case, not that in *Natusch v. Irving*, that the "reservation" "was made."<sup>2</sup>

In *Stewart v. Little Miami R. Co.*,<sup>3</sup> one of the grounds on which a provisional injunction against a change of railway location between unaltered termini was refused was, that "the original charter conferred authority to make the alteration complained of." Another ground was, that the plaintiffs by the suit sought protection for their interest as stockholders; that "their interest as landholders upon the route" was their main interest; that were it not for their landholding interest, the injury to their stock would not be a cause of complaint; and that the construction of "a great and important public work" should be suspended by injunction only "to prevent injuries that would otherwise be irreparable, or when the magnitude of the injury to be dreaded is so great, and the risk so imminent, that no prudent person would think of incurring it. Then

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<sup>1</sup> *Tomlinson v. Jessup*, 15 Wall. 454, 459.

<sup>2</sup> *Zabriskie v. Hackensack & New York R. R. Co.*, 18 N. J. Eq. 178, 185, 186.

<sup>3</sup> 14 Ohio, 353.

the complainants' right is doubtful; or an action at law or in chancery, prosecuted in the ordinary mode, will afford adequate redress." It was not shown that the public character and importance of the road would legalize a change of route or business in violation of the plaintiffs' rights,<sup>1</sup> and the decision has not shaken the settled doctrine that in this class of cases the plaintiff need not prove actual damage, and is not defeated by proof that he will be benefited by the unauthorized change. The beneficial character of the change may tend to prove the purpose of his litigation, and to disprove his claim for substantial damages in an action at law; but of itself alone, without a purpose inequitable in a legal sense, it is not an answer to a bill for an injunction.<sup>2</sup>

By their charter-contract all the stockholders of the Northern Railroad agreed that their partnership business should be the transportation of passengers and freight on their road, including certain incidental enterprises contributing to the transaction of that business. They formed the partnership for no other private purpose than the benefit to be derived from their performance of this contract, legally altered as it may be, under legislative permission, by their express or implied assent. No alteration has authorized a part of the company to suspend the company's performance of the contract by transferring their road and business to other principals for ninety-nine years. The plaintiffs have not acquiesced in the transfer and suspension, but have objected seasonably, and presumably in good faith for the purpose of protecting their Northern shares. The lease violates the partnership contract, and takes from the plaintiffs an equitable estate of ninety-nine years without their consent and without prepayment of the value of the estate taken. Whatever names are used to designate the trust and agency of the corporate partnership and the relation existing between each stockholder and the company, he has some remedy for their breach of the contract. "Wherever there is a legal right vested in a party, he must, in some court, have the means of enforcing that right."<sup>3</sup>

The private property of the Northern Company, subject to a public right of transportation, is held in trust by the corporation for the benefit of the stockholders. The corporation is trustee, holding the legal title. The stockholders are the beneficiaries, holding the equi-

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<sup>1</sup> 54 N. H. 648.

<sup>2</sup> *Central R. Co. v. Collins*, 40 Ga. 582, 617.

<sup>3</sup> *Adley v. Whitstable Co.*, 19 Ves. Jr. 304, 305.

table interest. "The jurisdiction to enforce performance of trusts arises where property has been conferred upon, and accepted by, one person on the terms of using it for the benefit of another."<sup>1</sup> The rule is that the equitable ownership includes a legal right to a performance of the trust which can be specifically enforced in a court of equity; and the authorities do not recognize a breach of corporate trust as an exception to the rule.<sup>2</sup> "A private or trading corporation is essentially a chartered partnership, with or without immunity from personal liability beyond the capital invested, and with certain other convenient attributes which ordinary partnerships do not enjoy. It is also something more than a partnership, because the legal or artificial person becomes vested with the title to all the estate and capital contributed, to be held and used, however, in trust for the shareholders. . . . The original subscribers contribute the capital invested, and they and those who succeed to their shares are always, in equity, the owners of that capital. But, legally, the ownership is vested in the corporate body, impressed with the trusts and duties prescribed in the charter."<sup>3</sup> Regarded as an imaginary person, the incorporated partners are a trustee whose breach of trust is restrainable by injunction at the suit of an objecting beneficiary, however profitable the breach may be to him. If the artificial body is disregarded, the partnership is as solid a ground of equity jurisdiction without the corporate fiction as with it.<sup>4</sup> "The important principle that one out of any number of shareholders or partners is entitled to the protection of the court against the illegal acts of the others, although he stands alone, was emphatically declared and strictly carried out by Lord Eldon in *Natusch v. Irving*, and *Const. v. Harris*. . . . In those cases Lord Eldon was dealing with partnerships and unincorporated companies; but precisely the same principle applies to all companies, whether incorporated by Act of Parliament, charter, letters-patent, or registration."<sup>5</sup>

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<sup>1</sup> Adams, Eq. 26.

<sup>2</sup> *Adley v. Whitstable Co.*, 19 Ves. Jr. 304, 306; *Dodge v. Woolsey*, 18 How. 331, 341-344; *Hawes v. Oakland*, 104 U. S. 450, 457, 458, 460; *Greenwood v. Freight Co.*, 105 U. S. 13, 16; *Stevens v. R. Co.*, 29 Vt. 545, 564; *Peabody v. Flint*, 6 Allen, 52, 56; *Brewer v. Boston Theatre*, 104 Mass. 378, 386, 395, 396; *March v. Eastern R. Co.*, 40 N. H. 548, 567.

<sup>3</sup> Comstock, C. J., in *Bissell v. M. R. Co.*, 22 N. Y. 258, 270, 274, 275.

<sup>4</sup> Story, Eq. c. 15.

<sup>5</sup> Lindley, Partnership, 900.



An injunction against the lease as a breach of the Northern trust, is, in effect, a decree that the trustee specifically perform the charter-contract and the trust declared in it. In the bill, the plaintiffs ask that the Northern company and their directors be ordered to resume the control, management, and operation of the Northern road. A decree for the plaintiffs, whether affirmative or negative in form, would run against the trustee, — not a mere imaginary person, but the whole body of stockholders, whose performance of their corporate trust is performance of their partnership contract. Whether the plaintiffs' rights, accruing from the contract, are called contractual, or fiduciary, they are subject to the general rule that inequitable performance is not specifically enforced when recoverable damages for non-performance are an ample remedy. The equity to compel specific performance of contract arises where an agreement, binding at law, has been infringed, and the remedy at law by damages is inadequate.<sup>1</sup> But the adequacy of a compensatory suit on a broken contract does not always depend upon the breach being financially injurious to the plaintiff. A breach that would be pecuniarily beneficial to him may be of such a nature in other respects that nothing short of prevention will be just. If the price fixed by a written executory agreement for the sale of a farm is more than the value, that fact is not an answer to a bill brought by the purchaser against the vendor for specific enforcement of the agreement. The purchaser, financially benefited by the violation of his legal right, would be financially injured by resorting to the remedy of a suit for nominal damages. "Compensation in damages, measured by the difference in price as ascertained by the market value, and by the contract, has never been regarded in equity as such adequate indemnity for non-fulfilment of a contract for the sale or purchase of land, as to justify the refusal of relief in equity."<sup>2</sup> The vendor's payment of the difference is not regarded by the law as a full, sufficient reparation for the purchaser who made the contract "on a particular liking to the land."<sup>3</sup> The damage is irreparable in the legal sense.

A written contract of farming partnership may be specifically enforced by an injunction against its violation when a majority

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<sup>1</sup> Adams, Equity, 77; Story, Eq. §§ 716, 717, 717 *a*; Fry, Spec. Perf. § 40; Pomeroy, Spec. Perf. § 3; Express Co. v. R. Co., 99 U. S. 191, 200; Eckstein v. Downing, 64 N. H. 248; Black v. D. & R. Canal Co., 22 N. J. Eq. 130, 399.

<sup>2</sup> Jones v. Newhall, 115 Mass. 244, 248.

<sup>3</sup> Buxton v. Lister, 3 Atk. 383, 384; Story, Eq. § 717.

of the partners make an unauthorized attempt to turn the whole partnership property and business over to other principals for ninety-nine years, in exchange for an annuity or other investment. On the question of equity jurisdiction, the mere expediency of the exchange as a financial measure would be as immaterial as the corporate or unincorporate form of the partnership organization. The recovery of one dollar by an expenditure of one hundred in a suit at law would not be a sufficient remedy for a partner objecting to the illegal change of his business. Specific relief would not be less necessary than in the case of a refusal to perform a written agreement for the sale of land.

Performance of the Northern charter-contract would not be rendered inequitable in law by the mere fact of non-performance being more beneficial to the stockholders. The plaintiffs' equitable right to be principals in the common-carrier business between Concord and Vermont according to their contract, would not be barred by a finding that it would be better for them to exchange that business for the occupation of a lessor, or the business of a road running from Concord to Maine or Massachusetts. They have not agreed that their partners may take them from the stipulated position of principals in the work of carrying passengers and freight between Concord and Lebanon, and give them any other vocation in which a court or jury may think they would be more profitably and judiciously employed. Their expulsion, for ninety-nine years, from the Northern carrier business, in violation of their partnership contract, is a case in which the general principle of equity gives an injunction, and the evidence shows no exceptional reason for withholding the specific relief necessary to prevent their wrongful exclusion from their chosen employment.

*Charles Doe.*

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SWIFT *v.* TYSON VS. GELPCKE *v.* DUBUQUE. — The REVIEW is requested to add to the citations in Mr. Rand's article in the last number the following authorities: *Harris v. Gex*, 55 New York, 421; and *Forepaugh v. R. R. Co.*, 128 Pa. State, 217, which is contrary to the decision in *Faulkner v. Hart*, mentioned on page 333.

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PROPOSED CHANGES IN THE BRIBERY LAWS. — The Attorney-General of Massachusetts, in his report for the year ending January 16, 1895, strongly advises material changes in the present bribery laws (pp. 26-29). As long as a party to the offence may constitutionally refuse to testify, on the ground that it may tend to criminate him, it is of little use to establish machinery for the enforcement of any law against corrupt practices in elections. Some effective way of securing such testimony must be adopted, it is urged, and the confinement of the criminality of the act to the person who pays the money is one of the means proposed. Whether this will work well in election cases or not, whether it would not be more expedient to punish the taker of the bribe rather than the giver, — are serious and important questions. In Kansas, where the method suggested was carried into effect in 1869, and given the widest scope, the results seem to have been far from gratifying. Indeed, there is now an agitation for the repeal of that law, and the substitution of another making only the bribe-taker punishable, on the ground that it is much more probable that one who has bribed a public officer might make that fact known, than that the public officer would proclaim his own disgrace. This reasoning, while certainly strong when the recipient is a public official, makes rather the other way when he, as candidate, is the giver. Since it is practically with this latter case alone, *i. e.* bribery at elections, that the Attorney-General is concerned, it would certainly seem that his suggestion was not open to the harsh criticisms which have



been passed on the existing law of Kansas. In its present restricted form, the measure proposed appears a sound one; how it would succeed in a wider sphere might be an extremely dubious problem, and one which might require for its solution a long experience of the respective merits and disadvantages of each method of securing evidence.

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INTERSTATE EXTRADITION. — An interesting point, arising under the clause in the Constitution of the United States providing for the surrender of fugitives from justice, is discussed by the Attorney-General in an opinion printed on p. 41. A requisition from the Governor of Nebraska was sufficient in form according to the U. S. Rev. Stats. § 5278, and not sufficient according to Ch. 218, § 1, of the Massachusetts Public Statutes. The Attorney-General was of opinion that the latter statute was void so far as it conflicted with the U. S. statute.

The Attorney-General's opinions, being written for a layman, do not cite authorities. An examination of the cases, however, seems to show that *Kentucky v. Denison*, 24 How. 66, decides that the United States statute and the provision of the United States Constitution create only a "moral duty." Taney, C. J., there said explicitly that "the Act does not provide any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the executive of the State; nor is there any clause or provision in the Constitution which arms the government of the United States with this power." The provision in the Constitution is there held to be addressed solely to the executive of the State, and it is expressly said that "The Federal Government under the Constitution has no power . . . to compel him to perform it" (p. 107).

If the constitutional provision be not enforceable against the State, as is declared in *Kentucky v. Denison* to be the case, it would seem logically to follow that for lack of binding force it cannot make void the Act of the State Legislature; for otherwise it will be left in this singular position: it will have no Federal sanction, and yet within the State it will, as part of the Federal Constitution, operate to prevent that control of the State officials from within which is also impossible from without. It would seem, therefore, that the opinion of the Attorney-General is not in accord with the authority of the U. S. Supreme Court. Against it may also be cited the declaration that the same statute is constitutional, made by a previous Attorney-General of Massachusetts in giving his opinion in the celebrated *Kimpton Case*, in 1878, 2 Moore on Extradition, 995. The *Kimpton Case* may be distinguished, and is believed to have been recently followed, but it is submitted that any distinction from this opinion is really without a difference.

It would seem that the circumstances of the case at once show it to be desirable that the status of the Massachusetts statute should be permanently fixed, and that the opinions of Attorney-Generals are not adequate as a means to that end. It would also seem that the case was one where the Judges of the Supreme Court might have been appropriately called in to fill their constitutional function of advisers to the Governor and Council. Surely, when a statute which has long stood upon the statute-book is to be declared unconstitutional, an "important question of law" and a "solemn occasion" is presented. (Mass. Const., Ch. III., Art. II.) Then *Kentucky v. Denison*, an extreme States-Rights decision, might be denied or distinguished away. Any distinction from the *Kimpton Case*

without a difference would probably be done away with, and the final result would be more satisfactory than the present practice, not the less grateful if this opinion stood and the *Kimpton Case* was overthrown.

UNCONSTITUTIONALITY OF THE SUGAR BOUNTY. — The opinion declaring the sugar bounty unconstitutional, news of which has been widely circulated in the general press, was delivered by Shepard, J., in the Court of Appeals of the District of Columbia, in *United States ex rel. the Miles Planting Co. v. Carlisle*, 23 Washington Law Reporter, 33, — Morris, J., concurring. Alvey, C. J., declined to express an opinion on the constitutional point. It is apparent on the most cursory examination that the opinion on the constitutional point is entirely *obiter*, for the law had been repealed, and the real case of counsel for the plaintiff was founded only on a general clause excepting vested rights. That clause the court of course held not to apply to an expectancy of a bounty or gratuity. Then the court go on to declare that the bounty to be constitutional must be for a federal public purpose, and to declare that the promotion of the sugar interest is not sufficient. The cases cited are familiar ones: *Loan Association v. Topeka*, 20 Wall. 655, and its well-known phrase, that a tax to pay a bounty "is none the less a robbery because it is done under the forms of law, and is called taxation," *Lowell v. Boston*, 111 Mass. 489, and *Cole v. Lagrange*, 113 U. S. 1. The other ground of the decision seems so clearly good that one wonders why the court launch a *brutum fulmen* against a repealed act, instead of letting the dead past bury its dead. The profession are indebted to Mr. Justice Shepard for a careful and scholarly consideration of the limits of taxation; but the profession must also recognize that it is a discussion *obiter*, and in no sense a decision.

POTTER v. THE UNITED STATES. — Mr. Asa P. Potter is to have a new trial, and lawyers will acknowledge that no other result was desirable on the case, as it came up in the Supreme Court (15 Sup. Ct. Rep. 144). Section 5208, Rev. Stat., passed in 1869, provided that no national-bank officer should certify a check unless the drawer had on deposit at the time an amount of money equal to the amount specified in the check. No penalty was imposed for a violation of this section, but in 1882 (22 Stat. 166) it was enacted that whoever should "wilfully violate" the statute of 1869 should be guilty of a misdemeanor, and should, etc. The court held that the word "wilfully" meant more than voluntarily, and that one could not wilfully violate a law if he supposed he was not violating it at all. Accordingly it is held to have been error to reject evidence of a *bona fide* agreement, by the bank officers, that a certain depositor's deficit should be treated as a loan, and that checks should be certified for him on condition that he deposited from day to day sums sufficient to cover the checks. Such an agreement, if the defendant honestly believed it lawful, would tend to negative a wilful violation of the law, although not conclusive of innocence. It was on this point that the actual decision was made, the court holding in effect that the statute required a specific intent on the defendant's part.

The indictment was held good. It alleged that the defendant wilfully certified a check by writing across the face thereof certain words. There was no allegation of delivery. Mr. Justice Brewer took it for granted



that delivery was necessary to constitute a certification; but he thought that to require an express allegation of delivery would be "too narrow" a construction of the indictment. It has generally been supposed that an indictment is bad if capable of a meaning which does not charge a crime, and that the courts will be astute to find it capable of such meaning. "Nothing shall be intended against a defendant." *United States v. Carll*, 105 U. S. 611; *Com. v. Grey*, 2 Gray, 501; *Com. v. Newburyport Bridge*, 9 Pick. 142; *State v. Brown*, 3 Murphy (N. C.), 224. As the counsel for the defence contended, everything in this indictment would be true if Potter had written on the check the words of certification, and then thrown it into the fire, instead of delivering it or causing it to be delivered. This would have been a conversion of the check, but it would not have been a certification, if the court was right in supposing delivery necessary.

Of the two points decided in the case, then, that on the indictment is against Mr. Potter, and that on the intent is the most desirable construction of an obscure statute, seldom enforced. The legal result, then, is not to be objected to.

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A CARELESS ACCEPTOR. — The decision in *Scholfeld v. Earl of Londesborough* (Court of Appeal, Dec. 19, 1894), 11 The Times Law Reports, 149, will not meet with universal assent. The facts of the case were, briefly, these: The defendant at the request of the drawer accepted a bill payable to the drawer's order for £500. The bill had been written by the drawer in such a way that space was left for inserting the figure "3" and the words "three thousand," and by so writing it the drawer was enabled subsequently to raise the amount of the bill to £3,500. Thereafter the drawer negotiated it to the plaintiff, a *bona fide* purchaser, for value without notice. The stamp was sufficient to cover the amount of the bill as raised. The court held, affirming the decision of Charles, J., 10 The Times Law Reports, 518, that the plaintiff could not recover. Charles, J., held that the facts did not show negligence on the part of the defendant. Lord Esher, who delivered an opinion with which Rigby, L. J., concurred, rested the decision of the Court of Appeal on the grounds that the defendant owed no duty to the plaintiff, and even assuming that he did, and that there had been a breach of the duty, the breach was not the cause of the plaintiff's loss, because a felonious act intervened. Lopes, L. J., delivered a vigorous dissenting opinion. Although the case may perhaps be distinguished from *Young v. Grote*, 4 Bing. 253, the distinction will make the earlier decision of very limited application; and, indeed, Lord Esher said of it, "That case ought not any longer to be quoted." 39 Sol. Law J. 164. In that case the opportunity for raising the check in question in the suit was afforded by a customer of the bank which paid it, and Lord Esher intimated that a customer might owe a duty to his banker, which an acceptor would not owe to the world at large. Whether Lord Esher would regard the position of the maker of a promissory note as analogous to that of an acceptor is not clear. It must be admitted that the reason for holding an acceptor, and especially an indorser, liable for the consequences of the improper form in which a bill or note is drawn or made is not so clear as the reason for holding the drawer or maker himself liable for such consequences. But the acceptor or indorser, though not in general empowered to add to or subtract from the face of a bill or note may certainly



draw a pen through spaces carelessly left in the body of the instrument. Further, the acceptor of a bill gives his acceptance on the faith of the drawer's credit, and as he would have the right to charge the drawer with the raised amount of a carelessly drawn bill, he should himself be liable to that extent to a *bona fide* purchaser. If it is a natural consequence of leaving blank spaces in a bill or note that the spaces will be fraudulently filled, it does not seem too much to say that any acceptor owes a duty to the public not to accept bills in that condition; and if the intervention of a felonious act is a natural consequence of so doing, it is hard to see how the fact that the act is felonious is important. If it were made a criminal offence for an agent to exceed his authority under specified circumstances, would that relieve the principal from all responsibility for the act, though within the apparent scope of the agent's authority?

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SCOPE OF A DROVER'S PASS.—An interesting question is presented in *Gulf & C. & S. F. Ry. v. Cole*, 28 S. W. R. 391 (Texas), as to the liability of a railway when a connecting road refuses to honor a through drover's pass which has been issued as incident to a shipment of stock. By the contract of carriage in that case all liability for the stock ceased at the terminus of the first road, and the court held the liability on the "pass" to be not so limited. The Chief Justice maintains, in a vigorous dissenting opinion, that although by its terms the pass purported to carry the drover to the ultimate destination of the stock and return, yet it must be assimilated to the provisions of the main contract, which reduced the liability of the first carrier beyond its own terminus to that of a mere agent for the other roads. It would seem, however, that this view is founded upon a mistaken analogy. He argues that, in the case of baggage, the first carrier is not responsible for a loss not occurring on its own line; but there is the vital distinction between the two cases that there is no separate contract for the transportation of baggage. He also invoked the principle that *prima facie* a railroad is not a common carrier beyond its own line, and that in the transportation of goods something more than a mere through contract must be shown to hold it liable. Now while it is true that any notice printed on the back of a ticket, and referred to on its face, may be part of the contract (*Myrick v. M. C. Ry.*, 107 U. S. 102), and a drover's pass and the contract of carriage must in some ways be construed together (*Railway v. Curran*, 19 O. St. 1), yet in this case the drover's pass, which was on the back of the shipping contract, contained no limitation whatsoever. Liability for loss on the stock was carefully guarded against, but no reference was made to the drover beyond the promise to carry him to his destination on the connecting road. Under these circumstances, if the question had been as to holding the first company as carrier, and not as simple contractor, for an injury to the drover on the second road, a much more difficult case would have been presented, as the presumption would be against their having undertaken any such liability. *Harlan v. Ry.*, 114 Mass. 47; *Quimby v. Vanderbilt*, 17 N. Y. 306. But in the principal case the defendant had issued a pass for value, by which it contracted that the bearer should be carried on the connecting road. It follows that whether it be regarded as an agent, as in *Brooks v. Ry.*, 15 Mich. 332, or not, it is clearly liable when the pass is dishonored and the drover ejected from the train, as here. *Hudson v. Ry.*, 3 McCrary, 249.

CRIMINAL ATTEMPT.—In *People v. Gardner* (25 N. Y. Supp. 1072, Supr. Ct.) an interesting question was raised in the law of attempt. By the New York Penal Code, § 552, "Extortion is the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right." By § 34, "an act done with intent to commit a crime, and tending, but failing, to effect its commission, is an attempt to commit that crime." In the actual case, a police officer tried to extort money from a person who was not put in fear by his threats, but was acting as a mere decoy to inveigle him into the commission of the crime. On this state of facts the court held that there was no attempt, as the completion of the act was in itself an impossibility, since fear, a necessary element of the crime, was wanting.

Some objections to this decision were presented in 7 HARVARD LAW REVIEW, 435, and it has since been overruled by the Court of Appeals of New York in the case of *People v. Gardner* (38 N. E. R. 1003).

The ultimate possibility of success is not, as was thought in the lower court, the only test of an attempt (*Comm. v. McDonald*, 5 Cush. 365), but is merely one of a variety of considerations which must be kept in mind when the question is one of criminal attempt. Given the intent, the problem is what constitutes the guilty act; and the solution depends on the greater or less extent to which the deed committed is to be regarded as a menace to the public (1 Bish. Crim. Law, § 737). To determine this, the case must be scrutinized in various lights. Is the act of sufficient magnitude, is there a distinct public policy involved, is there an infringement on personal or property rights, is the act near completion in time and place, are the means adapted to the end from a reasonable man's standpoint, and what that standpoint should be,—are all, as well as the question of ultimate possibility of success, important tests by which to determine the criminal act. These considerations are not, of course, always of equal weight, but shift and group themselves into infinite kaleidoscopic arrangements, in which the respective relations of the various rules are never stable. If the act is in its nature unequivocal, as the procurement of counterfeiter's dies, it would be found criminal more readily than if it can be easily explained on an hypothesis of innocence (May, Crim. Law, § 183), and if the act merely fails because the intended victim is not to be duped, as in cases of trying to obtain money under false pretences, the law is pretty clearly settled that the mere impossibility of success will not prevent the act being a crime (2 Bish. Crim. Law (8th ed), § 488). It would seem that the case of extortion is closely analogous to that of false pretences, and the decision of the Court of Appeals is one which will be welcomed as expounding the better view upon the subject.

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DOES QUASI-CONTRACT LIE FOR A SAVING?—The United States Government gave a paving contract to the lowest bidder, after fair warning that the saving thus effected would be due to infringement upon a patent held by one Schillinger for a process of laying pavements.

Schillinger brought an action in the Court of Claims, and as the United States permits itself to be sued only in "contract express or implied," it was necessary for him to show that his case contained the elements of such an implied or *quasi* contract as the courts will allow to be included under that head. In the Court of Claims the decision was against him, and now, on appeal, the Supreme Court confirms that



decision upon various grounds. *Schillinger v. United States*, 24 Ct. of Claims, 278; 15 Sup. Ct. Rep. 85. In the first place, it is objected that the construction of the words "contract express or implied" has always in this connection been limited to cases where there was a possibility of inferring a contract implied in fact, although the cases seem to show that it had not been thought necessary to show the fact of real contract, but only the possibility. *United States v. Great Falls Co.*, 112 U. S. 645; *Great Falls Co. v. Garland*, 124 U. S. 581. It is submitted that although the construction of a statutory phrase like the one in question is not a matter for strict logic, it would be better either to stop at real contracts, or to go on to all cases of unjust enrichment, and so not sacrifice the right to the form of the remedy.

It is, however, asserted by the court that there is no unjust enrichment, and a case is put which, though extreme, is a fair test of the principle. "Take for illustration," says Mr. Justice Brewer, delivering the opinion of the court, "a patented hammer or trowel. If a contractor, in driving nails or laying bricks, use such patented tools, does any patent-right pass into the building and become a part of it?" It is submitted that if the building contract were let at a low price, and it were known that the saving was due to a patented trowel which the contractor intended to use in defiance of the patentee, the owner of the completed building would be saved money by the violation of the patent. The government, says Mr. Justice Brewer, is not "in possession or enjoyment of anything" of the plaintiff's. That is, nothing has passed into the building; but what does that matter? There may be no authority in the printed reports for the truth that a penny saved is a penny earned, but has any one ever tried to controvert that saying of Poor Richard's with success? And would not a penny unjustly saved weigh as much in the pocket and on the conscience of an honest man? It is submitted that it would, and that an honest Government ought to be in no better position.

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"ACCEPTANCE" OF A CHECK — WHAT IS FORGERY. — In *First Nat. Bank v. Northwestern Nat. Bank*, 38 N. E. Rep. (Ill.), it appeared that a certain person under the name of W. S. C., Treas., drew a check on the plaintiff bank, payable to "C. H. W., Asst. Gen. Supt." (a real person). Some person unknown wrote on the check the signature of "C. H. W. Asst. Gen. Supt.," and the check was presented to the plaintiff, who indorsed it "Accepted, payable through Chicago Clearing House, Northwestern Nat. Bank, per S., Teller." The check was placed in the hands of C. & G., who delivered it to the defendant Bank, who indorsed it and presented it for payment through the clearing house. The plaintiff soon after payment discovered the "forgery," tendered the check to the defendant demanding back the money, and the defendant refusing, the plaintiff brought this action of assumpsit. It was held that the drawee who had paid the bank check could recover back the money so paid on discovery of the "forgery," the demand for repayment being made within a reasonable time after the discovery of such "forgery." The "acceptor" of a check was said to be estopped to deny the genuineness of the drawer's signature by his acceptance, but not to deny the genuineness of any indorsements on the instrument.

The doctrine is perfectly sound that a drawee who pays to a holder claiming under a forged indorsement may recover back the money as paid



under a mistake of fact. 4 HARVARD LAW REVIEW, 307, and cases cited. And it is also well established that an acceptor is estopped to deny the genuineness of the drawer's signature (*Bank v. Ricker*, 71 Ill. 439; Bigelow, Estop. (4th ed.), 498; 2 Harm. Estop., §§ 1006, 1008), but not that of the indorsers (2 Dan. Neg. Inst., §§ 1364, 1365; *Canal Bank v. Bank of Albany*, 1 Hill, 287). There are, however, two points determined by the court in this case, which if decided differently might have resulted in judgment for the defendant. In the first place the court speak of the plaintiff's indorsement of this check as "an acceptance or certification" making no distinction between the two obligations and following *Marine Nat. Bank v. Nat. City Bank* (59 N. Y. 67), hold that the "acceptance or certification" of the check simply warranted the drawer's signature and that it had funds sufficient to meet it, but that the acceptance or certification did not warrant the genuineness of the bodies of the checks either as to the payees or the amounts, or warrant the genuineness of the indorsements on the checks. It is submitted that the court were wrong in making no distinction between an acceptance and a certification, and that, though what was said above is true of the former, it is not sound as to the latter, and that *Marine Bank v. City Bank* (*ubi supra*) is not in accord with the weight of authority. A certification is more than an acceptance; it is not a warranty but an obligation. It is practically paying the check with the certifying Bank's Certificate of Deposit, and the holder of a certified check has no recourse against the drawer or against any indorser prior to certification, if the certifying bank refuses to pay. *Minot v. Russ*, 156 Mass. 458; *Louisiana Nat. Bank v. Citizens Bank*, 3 Cent. Law Jour. 220; *Merchants Bank v. State Bank*, 10 Wall. 647; *United States Bank v. Bank of Georgia*, 10 Wheat. 333; 1 Morse on Banks and Banking, §§ 414, 415. If, therefore, the plaintiff's indorsement is a good certification it is submitted that he could not recover back this money. It was also urged by the defendant that the forgery of the indorsement was not sufficiently proven inasmuch as it does not appear that the check was really drawn in favor of C. H. W., and, further, that it was deducible from the evidence that the check was delivered to some person unknown, and that it was in fact the intention of the drawer that such person should receive the money as payee, and that therefore it was not forgery for such a person to indorse the check with the name of C. H. W. The court decline to accede to this proposition, and in so doing quote at length from the recent English case of *Vagliano v. The Bank*, 23 Q. B. Div. 243 (1889), which holds in substance that the rule, that a bill drawn in favor of a fictitious payee is the same as a bill payable to bearer, cannot be applied where the name of the payee is the name of a real person, even although it was the intention of the drawer that such real person should never have anything to do with the bill. It would seem that this doctrine is unsound. In these cases of "fictitious" payees the important question is, Whom does the drawer intend to make the payee? When he draws the bill inserting the name of a real person as payee does he mean that such person shall receive the money, or does he intend that some other individual whom he has in mind shall be the payee under the name written in the instrument? The acceptor by his acceptance promises to pay the person indicated by the drawer, *i. e.* intended by the drawer to be the payee. If, therefore, the payee who indorses the bill is in fact the person intended by the drawer, it is submitted that the indorsement is no forgery, though the name indorsed be that of some other real person.

*Shipman v. Bank of N. Y.*, 126 N. Y. 318; *Phillips v. Mercantile Nat. Bank*, 140 N. Y. 556; *Armstrong v. Nat. Bank*, 46 Ohio St. 512; *Lane v. Kreckle*, 22 Iowa, 399; *Kohn v. Watkins*, 26 Kas. 691; *Phillips v. im Thurn*, L. R. 1 C. P. 463.

IMPLIED POWER OF SALE. — A case put by Lord Justice Lindley in delivering his opinion in *Henderson v. Williams* (11 Times Law Rep. 148), decided by the Court of Appeal last December, presents a most interesting question in the law of sale. Suppose R, a rascal, by fraudulently representing that he is the agent of X, negotiates a sale with A, who believes he is selling to X. A then notifies the warehouseman, who has possession of the goods, to hold them subject to the order of R, and a *bona fide* purchaser, relying on the warehouseman's statement that he so holds them, pays cash to R for the goods. Has title passed from the original owner to the *bona fide* purchaser? Lord Justice Lindley was of opinion that it had.

On the facts as they appear in the report, namely, that A thought he was selling to X through R as agent, it is clear that no title would have passed if A himself had delivered possession to R. *Cundy v. Lindsay*, 3 A. C. 459; *Rodliff v. Dullinger*, 141 Mass. 1; *Collins v. Ralli*, 20 Hun, 246; s. c. 85 N. Y. 637. It would have been a case of larceny by trick, and not of obtaining goods by false pretences. Does the fact that A authorized the warehouseman to deliver possession for him make any difference? This, it would seem, must depend on whether A's intention, as manifested by his overt act in so authorizing the warehouseman, was to give R not only the right of possession but also a general power of sale. It may, perhaps, be safely admitted that he did intend to give R power to dispose of the goods to such person as X, the supposed principal, should direct. But this doubtless would not be enough to enable R to pass title to a *bona fide* purchaser. One must go a step farther and say that he intended to give R a general power of sale. If this is conceded it is clear that the *bona fide* purchaser from R would get title, for R would then in effect be a trustee for X. Can this last step safely be taken? For aught that the purchaser knows, R may be agent for a principal who allows him to dispose of the goods only to such person as he, the principal, shall approve of. This is a perfectly possible transaction, and perfectly consistent with R's holding a delivery order on the warehouseman. Why, then, has the purchaser the right to suppose that it is not the real state of affairs? Why has he more right to suppose that R has a general power of sale, and to rely on such supposition, than one has to suppose that a person in possession has title and can pass it? The warehouseman is of course protected in delivering to the holder's order, because he was given authority to do so, but this seems very different from saying that, judged by his overt act, the owner must have intended to give R a general power of sale. Lord Lindley's view, it may be remarked, is not the less interesting in that it is *contra* to the result reached in the well known case of *Kingsford v. Merry*, 1 H. & N. 503.

The actual suit before the Court of Appeal was against the warehouseman, and as he had attorned to the *bona fide* purchaser, as well as represented that he held to the order of the rascal, the court decided that he was estopped by reason of such attornment, which is undoubtedly law. *Stonard v. Dunkin*, 2 Camp. 344; *Knights v. Wiffen*, L. R. 5 Q. B. 660. It must be admitted that this furnishes a strong practical argument in



favor of the view of Lindley, L. J., for if title has not passed as between the original owner and the *bona fide* purchaser, but has passed by estoppel as between the warehouseman and the latter, we should have a curious state of affairs. If the warehouseman knowing he was estopped gave up the goods to the purchaser, or if the purchaser replevied them, there would be nothing to prevent the original owner from bringing trover or replevin against the purchaser, for *ex hypothesi* the title has not passed as between them, and so in that case the loss would fall on the purchaser. If on the other hand the warehouseman, being indemnified by the owner, refused to give up the goods, and the purchaser brought trover, the final loss would fall on the original owner.

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INDICTMENT AND INFORMATION. — The defects of our grand jury as a means of beginning a criminal action have long been recognized, but the difficulties in the way of any radical change are by no means insignificant. In some States the power of district attorneys or County Prosecutors to begin proceedings by information is extensive, and in two at least, Connecticut and California, this power is coming into frequent exercise. In Connecticut the prosecution of any offence not punishable by death or imprisonment for life, in California the prosecution of any offence whatever may begin by information (Conn. Gen. St. §§ 1599, 1610. Cal. Const., Art. 1, sect. 8. Deering's Penal Code, §§ 809, 888). It will be interesting and profitable to observe the results of this experiment. That such a procedure has many advantages is obvious. It is quickly set in motion, errors are easily remedied, and the whole course of proceedings much accelerated. On the other hand the power thus given the district attorney is very great, and should have ample guaranties against misuse. It is not likely that we shall evolve out of this an office much like that of the Public Prosecutor (*Staatsanwalt*, *Procureur de la Republique*) on the Continent of Europe. There seems to be no disposition here to intrust any single official with the sole power and duty of instituting criminal proceedings. The grand jury is probably in no danger of being abolished, or of having the scope of its action much limited by law. But it is not improbable that the near future will see some considerable extension of the information as a concurrent alternative process. If this alternative process is wisely regulated, it is pretty certain that the grand jury will have little to do.

The grand jury originated at a time when the administrative machinery for the detection of crime was very crude and defective. Its retention in later centuries was chiefly due to political reasons. It furnished a tolerably safe protection against governmental tyranny and oppression. That was the light in which the founders of our American judicial systems still regarded it. But the past century has made great political changes, here and in England. We no longer fear the encroachments of a government above the people. As a defence against judicial usurpation the grand jury is no longer necessary. Viewed by itself it is seen to possess many defects. It is a secret, irresponsible body, offering some opportunity for the gratification of private malice or revenge. It is usually composed of men not well fitted to discharge such duties as rest upon it. It is swayed by popular passion and prejudice. We have all seen how tenderly it deals with lynchers. Its findings are frequently influenced by local political views. It cannot meet often, and when it does,



the bills must generally be passed on very hastily. Finally, defects or errors in indictments are remedied only with great difficulty and delay.

In many of these respects a single responsible official would be an improvement. The old reasons no longer deter us from intrusting to an officer of the government the power of putting men on trial for criminal offences. What we do have to guard against now is the misuse of such a power by reason of bribery, partisanship, or personal spite. On the one hand, proper prosecutions must not be suppressed; on the other, improper ones must not be commenced. An ample safeguard against the first evil is furnished in all our States by the retention of the indictment beside the information. In our law any person may set the courts in motion. On the Continent the Public Prosecutor does not, to be sure, possess the power of indicting or putting a suspected person on trial. That is done by a court, consisting generally of three judges. But the Prosecutor has the sole power, except in a few cases, of starting the preliminary examination. That is not desirable here, and is not likely to become the law in any of our States.

On the other hand, where our district-attorneys are invested with the power of proceeding by information in a large number of criminal cases, the law must guard the public from the institution of proceedings from corrupt or improper motives, as for purposes of extortion, for instance. Here the California statutes seem to have devised a sufficient protection by requiring a preliminary examination and commitment before the filing of an information (Deering's Pen. Code, §§ 809, 888). Apparently the Connecticut statutes provide no similar safeguard. In both States the information is frequently used, and apparently with the decided approval of the legal profession and the public generally. It would seem as if the example set by California were worthy of careful consideration in other States. Our criminal procedure is likely to receive considerable attention before very long. Lynching is not the only protest against its defects. There is a pretty general belief that some radical changes might be made with advantage (*cf.* the article by Mr. H. W. Chaplin in 7 HARVARD LAW REVIEW, 189). Possibly our law treats the prisoner with too much consideration. Certainly a criminal cause often proceeds at an aggravatingly slow pace and any reform looking toward the diminution of delays is desirable.

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## RECENT CASES.

**BILLS AND NOTES — NEGLIGENCE.** — Defendant accepted a £500 bill on a stamp sufficient for a £4,000 bill, so drawn that it was easily changed to £3,500, and afterwards bought by plaintiff in good faith. *Held*, affirming the decision of CHARLES, J. (63 L. J. Q. B. 649), that there was no duty of care toward plaintiff and no estoppel to set up the alteration. *Scholfield v. Earl of Londesborough*, 11 *The Times* Law Rep. 149. Compare *Young v. Grote*, 4 Bing. 253, and see NOTES.

**CARRIERS — DROVER'S PASS — UNLAWFUL EJECTMENT.** — Where a railroad contracts to transport live stock to a point on a connecting road, with an express limitation of liability to its own line, and at the same time issues a drover's return pass through to the destination of the stock, with no such limitation. *Held*, the liability of the first railway is not limited to wrongs suffered by the drover as a passenger on its own line, but it is responsible for his unlawful ejectment from the train of the connecting carrier. *Gulf, C. & S. F. Ry. v. Cole*, 28 S. W. Rep. 391. FISHER, C. J., dissenting. See NOTES.

CONFLICT OF LAWS — DEATH BY WRONGFUL ACTS — LIMITATIONS. — By the statute of Montana giving a right of action for death the action must be brought within three years; by the statute of Minnesota but two years are allowed. The deceased was killed in Montana, and the action brought in Minnesota more than two years, but less than three years after the death occurred. Defendant set up the limitation in the Minnesota statute. *Held*, the limitation of the Montana statute governs. *Theroux v. Northern Pacific R. Co.*, 64 Fed. Rep. 84.

The court bases its decision on *Boyd v. Clark*, 8 Fed. Rep. 849, where it was held that where a statute gives a right of action unknown to the common law, and limits the time within which the action may be brought, the bringing of the action within that period is a condition to the right, and that if the action is brought in a foreign court after the period prescribed has elapsed, no recovery can be had. This proposition does not seem to necessitate or sustain the holding of the court in the principal case. Limitations usually are governed by the *lex fori*, and cases like *Boyd* and *Clark* form a notable exception to that rule. Plaintiff here has complied with the condition upon which the Montana statute gave her the right; but, it is submitted, she should not recover in a jurisdiction whose laws provide that no action of this sort shall be brought after a specified time, which time has elapsed.

CONSTITUTIONAL LAW — COMMON LAW OF THE UNITED STATES. — *Held*, by Grosscup, District Judge, affirming his decision reported in 58 Fed. Rep. 858, that there is no common law of the United States, and that therefore prior to the passage of the Interstate Commerce Act no recovery could be had from a common carrier for excessive charges for carriage between States; since interstate commerce is a subject over which State laws cannot extend, and no law applicable to it had at that time been made by the United States. *Swift v. Philadelphia & R. R. Co.*, 64 Fed. Rep. 59.

In his opinion in this case Judge Grosscup ably maintains the position he has assumed, in spite of the contrary decision of Judge Shiras in *Murray v. Chicago & Northwestern Ry. Co.*, 62 Fed. Rep. 24.

See Notes, 7 HARVARD LAW REVIEW, 488; 8 HARVARD LAW REVIEW, 168.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — INTERSTATE COMMERCE. — A New York statute required that all goods made by convict labor in any State, except New York, should be labelled "convict made," before being exposed for sale. *Held*, the act was unconstitutional; first, because it operated upon property owned at the time it took effect; and secondly, because it discriminated between convict-made goods of foreign States and those of New York. *People v. Hawkins*, 31 N. Y. Sup. 115.

The second ground for the decision of the case is unquestionably correct, but the first is less satisfactory. It is evident that the direct result of such a requirement as this statute imposes would be to put convict-made goods in contempt and restrict their sale. But however this may be, it is none the less within the power of the legislature to enact such a statute, and this the court does not deny, but it insists that the regulations should operate only on those goods manufactured or imported after the passage of the act. In support of this position the court relies upon the case of *Wynhamer v. People*, 13 N. Y. 378, which is no doubt to the same effect as to an invasion of vested rights. Such a distinction cannot be approved. *Hare's Const. Law*, pp. 776, 777. The better view would seem to be to regard such regulations, provided they are fair and reasonable, with whatever restrictions they may incidentally involve, as within the customary power of the legislature, the legitimate exercise of which is not precluded by the Constitution. *Hare's Const. Law*, pp. 765, 766.

CONSTITUTIONAL LAW — LIQUOR LICENSE — SALE. — The respondent, an incorporated society of limited membership, maintained a club-house in St. Louis. Wines and liquors were served without profit to the members and their guests upon the former's acknowledging the receipt of the liquor and its price, which was thereupon charged to the account of each, to be paid monthly. The club was not licensed under an act regulating the sale of intoxicating liquors. *Held*, a distribution of liquor belonging to the club among its several members is not a sale within the act. Each member receiving the liquor was a co-owner with all the other members, and the transaction was a mere transfer of the special property of the other members to him. *State ex rel. Bell v. St. Louis Club*, 28 S. W. Rep. 604.

If a legislature wishes to prohibit the use of liquor in club-houses, which it may doubtless accomplish, the statute for the purpose must do more than forbid its sale. When two or more are collectively the owners of property, they may unite in good faith in dividing it; but if their association with the object of co-ownership is simply a device to defeat the law and evade the license fee, the courts will be quick to perceive the fraud and deal with it as such. The *bona fides* of the association is the test. The decisions fall on one side or the other, as this is made out. The case follows the gene-



ral principle established in other jurisdictions, and is chiefly interesting because the subject is one of first impression in Missouri. For collection of cases, see Black on Intoxicating Liquors, § 142, notes.

CONSTITUTIONAL LAW — TAXATION — VALIDITY OF ASSESSMENT. — The defendant company owned a bridge across the Ohio river, between Kentucky and Indiana. The State board of tax commissioners of Indiana made an assessment upon the property of the company within the State, but by mistake included in such assessment a portion of the bridge in Kentucky. *Held*, the judgment on its face related to property within the jurisdiction of the board, and in the absence of fraud could not be set aside by evidence *aliunde* or by matters *dehors* the record. *Youngstown Bridge Co. v. Ky. & Ind. Bridge Co. et al.*, 64 Fed. Rep. 441.

In the exercise of *quasi* judicial power, with final jurisdiction in questions relating to valuation and assessment, the board was justly considered like a superior tribunal in regard to its record. Though the judgment was erroneous there was no remedy. Such a view finds abundant support. Freeman on Judgments, § 135.

CONTRACTS — CONSTRUCTION — EFFECT OF PRINTED MATTER ON LETTER-HEAD. — Defendants mailed to plaintiffs an offer for the sale of sheet-iron, which defendants manufactured. Plaintiffs, refusing defendants' proposals, submitted a contract complete and express in terms, — which defendants accepted. The written part of their acceptance was absolute, but the words, "All sales subject to strikes and accidents," were printed upon the heads of both letters of defendants. In a writ upon the contract it was *held*, that the printed matter formed no part of the contract, so as to excuse a failure to deliver, caused by breakages in defendants' mills. *Summers v. Hibbard*, 38 N. E. Rep. 899 (Ill.).

This case goes farther than any authority cited in support of it. In *Express Co. v. Pinckney*, 29 Ill. 392, the company undertook to collect a draft and remit the proceeds. Their agent gave the customer an ordinary package receipt, with its blanks properly filled out for the special purpose contemplated. It contained printed conditions appropriate to the carriage of goods, which conflicted with the written matter, and the court *held*, that the writing only was to be considered in ascertaining the contract. *People v. Delany*, 96 Ill. 503, was a like decision, the written and printed parts of a contract for the hiring of convicts being plainly inconsistent. *Robertson v. French*, 4 East, 130, contains a *dictum* by Lord Ellenborough to the same effect, and the point was similarly decided in *Alsagar v. Dock Co.*, 14 M. & W. 196. In all these cases, there was a plain inconsistency between the written and printed parts, and the Court attempt to bring the present case within the principle, by saying that it is inconsistent that the contract should be both absolute, as shown by the writing alone, and conditional, as shown by the writing and printing together. See Parsons on Contracts (8th ed.), Vol. II. p. 633, and cases cited.

CONTRACTS — CONTRACT BY HEIR RELINQUISHING INTEREST IN ANCESTOR'S ESTATE — RELEASE OF RIGHT TO CONTEST WILL. — An heir for valuable consideration made a written agreement with his ancestor, whereby he relinquished all interest in the latter's estate, which might otherwise in the future vest in him as such heir, and covenanted with her, "her heirs, devisees, legatees, executors, and administrators," that he would "never in any manner, or to any extent, question, dispute, or contest any disposition of the property which she may have made, or may hereafter make, either by deed, or by her last will and testament." In this petition by the heir, to revoke the probate of an instrument purporting to be the will of the ancestor, on the ground of incapacity and undue influence, it was *held*, that the petitioner was estopped by his agreement from contesting an instrument, executed in due form, as the will of such ancestor, whether or not testatrix had the capacity, or was induced by undue influence to make it, and that such agreement is not void as against public policy, even though it estops the heir from contesting the will of an insane person, or a will executed under the influence of fraud or duress. *In Re Garcelon's Estate*, 38 Pac. Rep. 414 (Cal.).

The Court call attention to the difference between the rules of common law and equity as applied to the sale or assignment of mere possibilities, such as the expectancy of an heir apparent; how at common law such interests are not regarded as existing in such a way as to be the subject of a sale, or capable of passing by assignment, whereas in equity agreements for the sale or release of expectancies, if fairly made, and for an adequate consideration, are enforceable upon the death of the ancestor. 2 Story Eq. Juris., § 1040 *c.* In holding that the contract in question is not void as against public policy, the Court distinguish it from agreements in restraint of marriage or of lawful trade. "The contract is one which concerns the parties alone, and does not appear to us to be against public policy."



**CONTRACTS — WHEN PLAINTIFF CAN ANNUL AND SUE FOR FUTURE PROFITS.** — Defendant violated provisions of an executory contract made with the plaintiff, and showed an intention to continue such breaches, but did no act amounting to a physical obstruction or prevention of performance by the latter. *Held*, plaintiff could elect to treat the contract as at an end and sue for future profits. *Lake Shore, &c. Ry. v. Richards*, 38 N. E. Rep. 773 (Ill.).

This case was decided on a rehearing, and reversed the decision of the court on the former hearing, 32 N. E. Rep. 402, where the court held that absolute prevention or such an essential breach as amounted to prevention was necessary. The decision as it now stands seems clearly right on principle, and the numerous authorities referred to by the court. Where a party to a contract says he will not go on with it, or does acts showing that he will not, if the conduct or acts are such as to make a breach going to the essence of the contract, the other party should not be kept in suspense or be obliged to perform to no avail if he wants to recover. Such a requirement would be unjust and increase the damage and inconvenience of both parties. The rights of the parties should in case of such a contract be fixed at the time of the substantial breach, and plaintiff should be relieved from useless performance and recover for future profits.

**CORPORATIONS — LIABILITY OF CORPORATORS.** — Wisconsin statute provided that any three persons might form a corporation by signing and acknowledging articles declaring the purpose, amount of capital stock, etc., and that after such articles were filed the signers should have direction of the corporation, but that no such corporation should transact business with any other than its members until half the capital had been subscribed and twenty per cent paid in. After three persons had signed such articles, and before any stock had been subscribed for, two of the signers carried on business in the corporate name and incurred liability. The third signer knew that the others were carrying on business in the corporate name, and by slight attention to the matter could have learned that they were using his name as an officer. In an action for liability thus incurred brought against the three signers, *held*, that all three were liable. *Wechselberg v. Flour City Nat. Bank*, 64 Fed. Rep. 90.

The liability of the third signer under these circumstances must depend on a simple question of fact, — whether he has expressly or impliedly authorized the others to act for him. This is the view of the dissenting judge, who is clearly of opinion that no such authority was given. Judging from the facts as reported it is certainly hard to find any authority. The majority of the court finds it in the signing of the articles, but despite a conflict in the cases, the better view is that the signing of the articles does not make the signers partners. *Rutherford v. Hill*, 22 Ore. 218; *Bank v. Palmer*, 47 Conn. 443; *Morawetz on Corporations*, § 748.

**CRIMINAL LAW — EXTORTION — ATTEMPT TO COMMIT.** — By New York Penal Code, § 552, "Extortion is the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right." By § 34, "An act done with intent to commit a crime, and tending, but failing to, effect its commission, is an attempt to commit that crime." *Held*, although the prosecutrix was not put in fear by defendant's threats, but parted with her money for the purpose of inveigling him into the commission of the crime, that an indictment for an attempt to commit extortion would lie. *People v. Gardner*, 38 N. E. Rep. (N. Y.) 1003; overruling *People v. Gardner*, 25 N. Y. Supp. 1072, commented on 7 HARVARD LAW REVIEW, 435. See NOTES.

**CRIMINAL LAW — SUFFICIENCY OF INDICTMENT — JUDICIAL NOTICE.** — The caption of an indictment contained the name of the county of Worcester, the accused was described as being a resident of B. in the county of Franklin, and the offence was alleged to have been committed "at Westminster, in said county." *Held*, the indictment is defective in not stating with sufficient certainty the county in which the offence was committed. "While the court knows that there is a town named Westminster in the county of Worcester, there is no allegation that the offence was committed at the town of Westminster, but simply at Westminster, which is not alleged to be a town or a place within the county of Worcester." *Commonwealth v. Wheeler*, 38 N. E. Rep. 1115 (Mass.).

The rule that when two counties are named it is not enough to describe the offence as committed in the "county aforesaid," would not seem to apply to cases where the offence is described as committed in a particular place in the "county aforesaid," because a court will generally take judicial notice of the location of places within its own jurisdiction. See 8 HARVARD LAW REVIEW, 360. Therefore an allegation of the particular place in which it was committed would be equivalent to stating that it was committed within the county where the place is located. *People v. Breeze*, 7 Cow. 429. In that case two counties are mentioned in the indictment, and a statement that the offence

was committed "at the town of F., in said county," was held to be a sufficient allegation of the county in which the offence was committed, because the court will take judicial notice that F. is in a certain county. That case is distinguished from the principal case on the ground that here there is no allegation that the offence was committed at the town of Westminster, but simply at Westminster. For this flimsy and technical distinction the court relies upon *Commonwealth v. Barnard*, 6 Gray, 488. The court admits that it "knows that there is a town named Westminster in the county of Worcester." Would it then be too great a relaxation of the rule requiring an indictment to be certain, if the court were to interpret "at Westminster" as meaning "at the town of Westminster"?

**DAMAGES—INJURY TO A FISH-NET FROM FLOATING LOGS.**—Evidence of the value of fish usually caught is admissible in an action for damages to a trap caused by floating logs. *Gwaltney v. Scottish Carolina Timber & Land Co.*, 20 S. E. Rep. 465 (N. C.).

This case illustrates the importance to the practising lawyer of a correct understanding of the law of damages in order to enable him to get before a jury the several items of his client's loss. There is a great tendency to forget that evidence of this kind is simply to be regarded as bearing on the amount of the loss, and to claim that it should be admitted or rejected by some hard and fast rule of law. There is no question but that this evidence, if offered simply as showing the profits which the plaintiff had been making from his trap would have been promptly excluded as irrelevant. If testimony in regard to previous profits was the only evidence presented that bore on the damage suffered, it might also be rejected as speculative and conjectural. *Wright v. Mulvaney*, 78 Wis. 89. But the plaintiff is undoubtedly entitled to the cost of repair of his net, and also to its value during the time the defendant has deprived him of its use. One perfectly legitimate method of showing its value is to show what it has been worth from day to day in the fish-catching way, and it is believed that if evidence of the amount of fish caught were to be offered as bearing on this point, other testimony being submitted to show a continuance of former conditions, it could not be rejected.

**DAMAGES—WAGES OF OPERATIVES NOT RECOVERABLE FROM A CONTRACTOR IN DEFAULT.**—Where a contractor does not furnish mill machinery at the agreed time, and the owner thereby is obliged to pay wages to his operatives during a period of enforced idleness, *held*, such wages are not an item recoverable in damages from the contractor when the workmen were hired after the making of the contract, as the loss of their wages could not have been in the contemplation of the parties. *Fraser v. Mining Co.*, 28 S. W. Rep. 714 (Texas).

The court in this case reach the correct result that prospective profits which might have been earned during the period of delay cannot be recovered. But the doctrine in regard to wages seems to have received little consideration, and not to be justified by authority. It is submitted that notice is given by the nature of the agreement itself, that operatives will be under contract to begin work as soon as the machinery is in place, and the loss of their wages to the employer therefore follows as a natural and proximate result of the breach. This is held in *New York Syndicate v. Fraser*, 130 U. S. 611, a leading case which does not seem to have been called to the attention of the court.

**EQUITY—MANDAMUS—INTERFERENCE BY CIVIL COURTS IN THE AFFAIRS OF A RELIGIOUS SOCIETY.**—Where a bishop acting under his discretion, in accordance with the canons of the church, refuses to allow a clergyman to officiate, *held*, a mandamus will not issue at the suit of the rector, wardens, and vestry, to remove such inhibition. *Rector, &c., of St. James Church v. Huntington*, 31 N. Y. Supp. 91.

Under the New York statute, the plaintiff (which would ordinarily be a voluntary association, and sue in the name of trustees) is an organized corporation, and sues in its corporate name. 2 Rev. Stat. of 1813, p. 212. Its rights however are in no way more extended than those of any other private corporation, and the present case is to be decided simply on the principles of the common law applicable to such bodies. Tyler, Am. Ecc. Law, §§ 104, 105; *Calkins v. Cheney*, 92 Ill. 463. Accordingly, the power of a civil court to interfere in an ecclesiastical suit is very limited. It has no general visitatorial capacity, and can take cognizance only in cases of abuse of trust, fraud, rival claims to church property, and where civil rights are directly involved. *O'Hear v. De Goesbriand*, 33 Vt. 593; *Church of Hartford v. Witherell*, 3 Paige Ch. 296. Thus mandamus will not lie to compel a religious society to reinstate an expelled member if such sentence does not affect his civil rights. *Salé v. Church of Mason City*, 62 Ia. 26. It has also been held that want of authority in the judicial body, and a misconstruction of the canon on which the defendant is being tried furnish no ground for interference. *Chase v. Cheney*, 58 Ill. 527. The canon requires a clergyman to procure the assent of the bishop to his induction into a new parish, and allows the latter to decline to give this for probable cause. If such assent is withheld no binding contract with



the vestry of the new church can be made, and there can therefore be no reason for the intervention of equity to aid in enforcing what does not exist.

**EVIDENCE—ENTRIES IN MEMORANDUM BOOK.**—To prove the quantity of logs scaled during the winter, the defendants offered in evidence a book, kept by their foreman, containing daily entries made by him. The foreman and F., the man who did the work, at the end of each day used to figure up the total amount of logs scaled during the day, from tally-boards kept by F., and the foreman set down the amount in the book in question. F. could not be found so as to obtain his testimony with regard to the scale. *Held*, the entries are not admissible unless supplemented by the testimony of the person furnishing the original data, since they were not made by one having a personal knowledge of the facts which he recorded. *Chicago Lumbering Co v. Hewitt*, 64 Fed. Rep. 314.

In *Mayor, etc., of N. Y. v. Sec. Ave. Railroad Co.*, 102 N. Y. 572, where similar entries were let in, they were accompanied not only by the testimony of the foreman who made the entries, that he correctly entered the amounts as reported, but by that of the man who had personal knowledge, that he reported the facts correctly to his foreman. Unless accompanied by this supplementary testimony, it seems to be the general rule, as stated in the principal case, that the party making the entry must have personal knowledge of the fact which he records. (See cases cited in the opinion.) There has been, however, a slight relaxation in this rule in *Curren v. Crawford*, 4 Serg. & Rawle, 3, where the person making the entry knew nearly all the facts which he recorded, but not all; and the entry was admitted without the supplementary testimony of the man who did the work.

**INSURANCE—LIMITATION IN POLICY.**—A policy of insurance against death from an accident stipulated that an action thereon must be brought within one year from the date of the happening of the alleged injury. *Held*, that the limitation begins to run from the death of the insured, and not from the time at which the right of action accrues. *McFarland v. Railway Acc. Ass'n*, 38 Pac. Rep. 347 (Wyo.).

In fire insurance policies, the courts have gone very far in holding similar clauses to run only from the accruing of a right of action, in analogy to the statutes of limitation. But in the principal case the court refuse to follow these authorities in interfering with the plainly expressed intent of the parties, and say that in accident policies at least, the language must govern when clear. This would seem right on principle, though, doubtless, a scintilla of ambiguity would be seized to avoid the result.

**PERSONS—HUSBAND AND WIFE—RIGHT OF HUSBAND'S CREDITORS TO PROFITS OF WIFE'S ESTATE.**—Where a husband engaged in business with his wife's capital in her name, on her credit, and for her benefit, and owing to his labor and special skill large profits accrued, *held*, after deducting the necessary expenses and indebtedness of the business, and the support of the family, a court of equity will apportion the profits between the wife and the existing creditors of the husband. *Bogges v. Richard's Adm'r*, 20 S. E. Rep. 599; *Vance v. Richard's Adm'r*, 20 S. E. Rep. 603.

This decision is opposed to the generally accepted rule of law that a man may give away his labor, but it is supported by many dicta, and by at least one decision, *Murphy v. Taylor*, 16 Ohio St. 509, and seems eminently fair. The courts go on the principle that anything beyond the usual profits, due to the husband's labor and skill, is not properly a part of the profits of her separate estate, but is the result of the husband's skill, and that to allow the wife to take it all would be a fraud upon the husband's creditors.

**PERSONS—PRESUMPTION OF COERCION OF WIFE BY HUSBAND.**—Mary Moore was convicted of perjury at the trial of her husband and excepted on the ground that the rulings below were not correct. Those rulings, evidently, were that there was the presumption that she acted under the control of her husband, but it could be rebutted. *Held*, rulings were correct. Under the Massachusetts statute which provides that the wife shall not be compelled to be a witness on the trial of the complaint against her husband, the fact that she takes the stand, is evidence to rebut the presumption. Lathrop, J., also says that where a wife testifies in a complaint against her husband under the statute in question, there is no room for the application of the rule that there is a presumption of coercion. *Commonwealth v. Moore*, 38 N. E. Rep. 1120 (Mass.).

This presumption of coercion in criminal cases seems to have preserved a place in our law long after all reason for it has passed away. Under our Married Women's Acts the wife is a very independent person, and the rule, founded on mediæval conceptions, seems inapplicable. In the Penal Code which Stephen, Blackburn, and others prepared, it was proposed to abolish this presumption. The fact that the courts refuse to apply it in the cases of heinous crimes would also seem to show that it has no foundation in fact. The courts might have said that the Married Women's Acts took away



the reason of the rule, and that the rule should end; but they refused to take this step. 97 Mass. 547; id. 225-229. Under the statute in the principal case it seems plainer, however, that the legislature did not intend the old presumption to continue.

**PROPERTY — ACCESSION.** — The plaintiffs made and baled hay on the defendant's land, under a *bona fide* claim of right. The defendant interfered with its removal, and the plaintiffs bring replevin. *Held*, that since the plaintiffs took the grass in good faith, and greatly increased its value, the defendant making no effort to stop them, the title has changed, and the defendant is left to his action for the value of the grass. *Carpenter v. Lingenfelter*, 60 N. W. Rep. 1022 (Neb.).

The court follow the decision in *Wetherbee v. Green*, 22 Mich. 311, making a great change in value sufficient to pass title, though there has been no such change in substance as was required by the old rule of accession. The other cases cited, while in form actions of replevin, were in fact for damages only, and hence are not authorities for this decision. The earlier Nebraska case, *Baker v. Meisch*, 29 Neb. 227, involved a change from clay to bricks, which might well go upon the stricter rule, so that *Wetherbee v. Green* is the only case directly in point. The court dwell upon the fact of good faith, which it would seem should not affect the question of title at all.

**PROPERTY — ADVERSE POSSESSION — NOTICE.** — Tenant for years remained in possession after the end of the term, and received a deed of the land from one claiming title under a tax sale. He continued in possession as before, and in suit to quiet title set up this possession under the deed as adverse to his lessor and those claiming from him. *Held*, that the mere recording of the deed was not notice to the lessor, but that there must be some unequivocal act to mark a change in the character of the possession before the statute would begin to run. *Millett v. Lagomarsino*, 38 Pac. Rep. 308 (Cal.).

The case is right. The doctrine of constructive notice from recording deed cannot apply in such a case, and knowledge of the claim of right must be brought to the landlord by some act inconsistent with the tenancy.

**PROPERTY — BAILMENT — ESTOPPEL.** — G. having sugar warehoused with defendants, arranged that they should hold it subject to the order of F. F. sold to plaintiffs, who had defendants transfer the sugar to them on the warehouse books. The fraud of F. appearing, G. persuaded defendants to refuse the goods on the plaintiffs' demand. *Held*, that defendants were estopped to deny the plaintiffs' title, and liable for a conversion accordingly. *Henderson v. Williams*, 29 L. J. 766; 11 *The Times Law Rep.* 148. See NOTES.

**PROPERTY — EMINENT DOMAIN — CONFLICTING PUBLIC USES.** — *Held*, that land owned by a street-railway company, and used by it as a horse barn and a warehouse for property used in its business of public carrier, but on which it has no tracks, may be condemned by an elevated railroad company for its right of way. *Chicago W. D. Ry. Co. v. Metropolitan W. S. El. R. R. Co.*, 38 N. E. Rep. 736 (Ill.).

The court seem to make this case turn on whether the property condemned would include tracks used as rights of way by the defendant. It is submitted that this is not the true test, but that a sounder rule is laid down in *C. W. & M. R. R. Co. v. City of Anderson*, 38 N. E. Rep. 167 (Ind.), where it was held that buildings used by a railroad in the operation of its road could not be condemned, even for a highway. For comment on that case and authorities, see 8 HARVARD LAW REVIEW, 289.

**PROPERTY — LEGACY TO CHARITABLE INSTITUTIONS — CY-PRES.** — The testator's will contained a clause worded thus: "I give the following charitable legacies." Here follows a number of legacies to charitable institutions, among which is this one, on which the action is founded: "to the rector for the time being of St. Thomas Seminary, for the education of priests in the diocese of Westminster, for the purposes of such seminary, £5,000." St. Thomas Seminary was an existing institution when the will was made, but was dissolved previous to the death of the testator. The question before the court was whether the legacy to it lapsed, or might by cy-pres be applied to other charities. *Held*, by the Court of Appeal, affirming the judgment below, that the legacy lapsed, since the object of the bequest had ceased to exist, and cy-pres could not be applied because the intent of the testator was to give the legacy not to charity in general, but to the particular institution known as St. Thomas Seminary. *In Re Rymer, Rymer v. Stanfield*, L. R. [1895] 1 Ch. D. 19.

There is no doubt of the correctness of the rule of law here laid down, though considering the terms of the will and the well known liberality with which the doctrine of cy-pres is applied, one is surprised that the court did not find that the main object of the bequest was a general charitable purpose.

See Gray's Rule against Perpetuities, § 607.

**PROPERTY—WAREHOUSEMEN—CONVERSION OF GRAIN—WAREHOUSE RECEIPTS.**—Laws 1876, c. 86, § 6, provide that no person holding grain in store should dispose of or deliver it out of the warehouse without the express authority of the owner of the grain, and the return of the receipt given therefor. Defendant was convicted of a violation of this statute. His receipt for the grain contained a condition to the effect that he reserved an option, either to deliver the grade of wheat that the ticket called for, or to pay the bearer the market price, on the surrender of the ticket. It was *held* that this did not render the contract one of sale. It merely gave the warehouseman an option to buy when the receipt was presented, instead of returning the grain in specie. This option could only be exercised when the receipt was presented, and by the payment of the money. Conviction affirmed. *State v. Rieger*, 60 N. W. Rep. 1087 (Minn.).

There has been some discussion as to the nature of the transaction between a warehouseman of grain and his depositors, under the conditions here set down. The principal case accords with the prevailing view, that, in such circumstances, title in the grain does not pass upon deposit, but only when the warehouseman has exercised his option; and this, though not a kernel of the original deposit remains in store, from the nature of the business. *Nelson v. Brown*, 44 Iowa, 455; *Sexton v. Graham*, 53 Iowa, 181; *Herns v. Raymond*, 26 Wis. 74; *Aldridge v. Johnson*, 7 El. & Bl. 885, 898; *Langton v. Higgins*, 4 H. & N. 402. 6 HARVARD LAW REVIEW, 450, at 465. But see *Chase v. Washburn*, 1 Oh. St. 244.

**QUASI-CONTRACT—"CONTRACT EXPRESS OR IMPLIED."**—The United States are not liable in tort, but only in contract, express or implied. Expense was saved to them by an arrangement, made with a contractor, whereby the plaintiff's right as patentee was deliberately disregarded. The plaintiff sets up a claim. *Held*,—1st. That there is no unjust enrichment in a saving of expense, where no corpus of the plaintiff's passes into defendant's hands. 2d. The United States are liable in *quasi* contract only, where the circumstances would make it possible to infer a contract in fact. Affirming *Schillinger v. U. S.*, 24 Ct. of Claims, 278; *Schillinger v. U. S.*, 15 Sup. Ct. Rep. 85. See NOTES.

**QUASI-CONTRACT—WHEN CAUSE OF ACTION ACCRUES.**—A wife furnished her husband with money to build a house under an oral agreement that he would convey it to her when it was finished, together with certain land. After the wife's right of action for specific performance had been barred, the husband sold the land. *Held*, no new cause of action arose, and the wife cannot sue to recover the price of the land sold. *Cooley v. Lobdell*, 31 N. Y. Sup. 202.

The case seems analogous to the sale of a chattel by a converter, who has had possession for the period fixed by the Statute of Limitations. The chattel having become his, he is, in effect, selling his own property, and consequently, the original owner of the chattel cannot bring suit for money had and received. Keener on Quasi-Contracts, p. 177. In this case the wife could not prevent the sale, and it would seem that she acquired no new right from it.

**TORTS—DEATH BY WRONGFUL ACT—ACTION DOES NOT LIE FOR NEGLIGENCE BY OMISSION.**—Under a statute allowing an action "in all cases in which the death of any person ensues from injury inflicted by the wrongful act of another, and in which an action for damages might have been maintained at common law had not death ensued," it was *held*, that no action could be maintained for the death of a person killed through the defendants' negligent omission to shore up the roof of their mine. *Myette v. Gross*, 30 Atl. Rep. 602 (R. I.).

The language describing the wrongful act differs slightly in the statutes of the different States. In most of the statutes, in addition to the words "wrongful act," are the words "negligence," "carelessness," "omission," or "default," clearly covering a case like the present. The Rhode Island Court have construed their statute liberally to the extent of applying it to a negligent act of commission, *McCaughy v. Tripp*, 12 R. I. 449, but beyond that they refuse to go, *Bradbury v. Furlong*, 13 R. I. 15; though an extension to a case like the present would seem entirely natural and justifiable.

**TORT—DECEIT—PLAINTIFF NEGLIGENCE IN RELYING ON THE REPRESENTATIONS.**—A vendor of land was sued for making representations as to the land, thereby inducing plaintiff to buy. *Held*, the necessary elements for maintaining an action of deceit being present, plaintiff will not be debarred because he was negligent in relying on the false statement. *Speed v. Hollingsworth*, 38 Pac. Rep. 496 (Kan.).

This decision is directly contrary to *Brady v. Finn*, 38 N. E. 506 (Mass.), criticised in 8 HARVARD LAW REVIEW, p. 365, and it is pleasant to note that Kansas is strongly in favor of what seems the fair and just view.



## REVIEWS.

TAGORE LAW LECTURES, 1894. THE LAW OF FRAUD, MISREPRESENTATION, AND MISTAKE IN BRITISH INDIA. By Sir Frederick Pollock, Bart. Calcutta: Thacker, Spink, & Co., Publishers to the University of Calcutta. London: W. Thacker & Co., 87 Newgate Street. 1894. pp. xii, 160.

How can a man do better than his best? What can the distinguished author have to say on the law of fraud that has not already been said compendiously and exactly in his admirable works on Torts and Contracts? How can lectures at Calcutta differ from lectures at Oxford?

One who, in this sceptical spirit, takes up the Tagore Lectures will meet with an agreeable surprise. Much, very much, in the shape of valuable suggestion and criticism will be found here that is not stated with equal fulness and distinctness in the writer's earlier books. The explanation is not that the law has grown during the last year or two. It is rather that, in preparing these lectures, Sir Frederick Pollock has had the great advantage of contemplating the law from a comparatively new point of view. The principal task of one who prepares a text-book for home practitioners is to state in neat and concise form the resultant force of the home decisions; and any criticisms ventured upon are only incidental. But he who undertakes to state the home law to what may fairly be called a foreign audience, in a foreign country, has another task before him. It is not enough to say, This is the result reached by the English courts. His hearers will demand to know what are the fundamental reasons, if any, upon which those results have been reached. No one can carry out the theory that judicial authority is the unerring guide to truth when he goes beyond the limits of his own country, even if the country to which he speaks is under the same general dominion.

Although Sir Frederick Pollock has always paid great regard to principle, and has in no sense been the slave of authority, yet in none of his text-books has he ever written with so free a hand as in these lectures delivered at the University of Calcutta. The best test of a so-called legal principle is to attempt to explain it to an intelligent foreign community; and it will be found in relation to some doctrines that "the very act of expounding" them to a stranger will sufficiently condemn them.

Undoubtedly, in some respects, India does not stand to England in the relation of a foreign country. Indeed, the author says (p. 12) that the law to be dealt with in this course "will in the main be English law;" but he adds, "it is not English law pure and simple. It is Anglo-Indian law. . . ." On many subjects the rules of English law prevail, "if found applicable to Indian society and circumstances" (p. 10). But (p. 54) "considerations of local fitness must always have weight when precedents are cited from a country remote both in place and manners." It is admitted (p. 52-54) that such a leading English case as *Rylands v. Fletcher* has been "materially qualified in its application to British India." And it is rightly said (p. 54) that to follow *Filburn v. Aquarium Co.* in India "would be both absurd and disastrous." So the rule of evidence admitting dying declarations has been found in India to work badly. "A remark made on the policy of the rule by a native of Madras shows how differently such matters are viewed in different parts of the world. 'Such evidence,' he said, 'ought never to be admitted in any case. What motive for telling the truth can any man possibly have when he is at the



point of death?" It is even reported that, in the Punjab, "a person mortally wounded frequently makes a statement bringing all his hereditary enemies on to the scene at the time of receiving his wound, thus using his last opportunity to do them an injury" (1 Stephen's History of the Criminal Law of England, pp. 448-449).

Even if these lectures are to be regarded simply as English law carried to India and brought back again, it is plain that English law has been a gainer by its travels; it comes to us now with an improved flavor, such as a pipe of wine was formerly supposed to acquire by a voyage to Bengal and back.

Macaulay, in a familiar passage, has asserted that British lawyers, if called upon to answer a question as to the postulates on which their system rests, or to vindicate the fundamental maxims of that system, often talk the language of savages or of children. No such reproach can be made against the author of the Tagore Lectures. While he has never criticised for the mere sake of fault-finding, yet he has not attempted to evade a single difficulty, and has not hesitated to question, in a manner at once temperate and forcible, some existing English doctrines.

It is, perhaps, fortunate that this book did not appear earlier, for it would very likely have embittered the last days of Mr. David Dudley Field. The Draft Civil Code of New York comes in for pointed condemnation. It is spoken of as a "much and justly criticised performance;" "an ambitious and unsatisfactory composition, which has had an evil influence on the Indian Codes in more than one place." It is even said of certain clauses: "In fact, the only definite notion they convey to the mind of an English lawyer is, that the men who set their hand, in the New York draft of a Civil Code, to the work of codifying the Common Law, were not lawyers enough to understand the nature of the difficulties, nor sufficiently skilled in drafting (not to say the correct use of the English language in general) to clothe their meaning, when they had one, in apt words." (See pp. 20, 95, 99, 122.)

J. S.

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THE FEDERAL INCOME TAX EXPLAINED. By John M. Gould and George F. Tucker. Boston: Little, Brown & Co. 1894. pp. xiv, 108.

This little book makes no pretensions to being a complete treatise on the income tax. Its avowed object is simply to elucidate those parts of the new statute which have occurred in former acts and been construed in that connection; and, under the belief that a similar interpretation will be given in the present case, the authors have ransacked the books to good purpose. Recourse has been had not only to American reports, but also to English and Canadian decisions, though to a far less extent as less applicable to our recent act, and the work as a whole, though necessarily of somewhat hypothetical value, has been put into a serviceable shape for the profession at large.

D. A. E.

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GENERAL DIGEST, AMERICAN AND ENGLISH, ANNUAL, 1894. Prepared and published by the Lawyers' Co-operative Publishing Co., Rochester, N. Y., 1894. pp. lxxxiv, 3070.

This is the ninth volume of the "General Digest of the United States." The new title is in recognition of the presence of the English and Canadian decisions. The size pp. 3162 is to be compared with pp. 2722 of the rival publication which has a somewhat larger page and certainly no larger type.

R. W. H.

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## A SIMPLE PURCHASE AND SALE THROUGH A STOCKBROKER.

DURING the last hundred years there has been an enormous increase in the indebtedness of corporations and political bodies. This has been accompanied by a corresponding increase in the amount of what are known as the securities of corporate and political bodies, which are used as evidence of the larger part of this indebtedness. Since these securities have a value which is measured in money, they are constantly used to raise money on, constantly bought to invest money in and sold to realize money from. So, too, there is a great deal of speculative buying and selling in those kinds of securities whose values fluctuate either from natural or artificial causes. All these transactions in securities centre wherever money centres. In such places are found stockbrokers, so called, who make it their business to act as agents for the many individuals who wish to deal in or with securities. Wherever there are many stockbrokers, as in the larger money centres, it has been found convenient to establish Stock Exchanges. These are in their nature private business associations or clubs,<sup>1</sup> founded by stockbrokers to facilitate<sup>2</sup> and regulate dealings in

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<sup>1</sup> Commercial Tel. Co. v. Smith, 47 Hun (N. Y.), 494; Belton v. Hatch, 109 N. Y. 596; Clute v. Loveland, 68 Cal. 254. Stock Exchanges are not usually incorporated, nor are they to be deemed partnerships; on their nature see cases cited; also Dos Passos on Stock-brokers and Stock Exchanges, 12-17; 23 Am. & Eng. Enc. of Law, 748, under title "Stock Exchange."

<sup>2</sup> Dos Passos. Preface, page v.

securities, to which other stockbrokers may become members by election.<sup>1</sup> Governors, officers, and committees with power to make rules regulating matters connected with the Exchange, the conduct of its members, and the transaction of business are elected by the members. The rules they make are supplemented by a variety of established customs, which have the same force and effect as the written rules.

A stockbroker who is a member of a Stock Exchange must act in accordance with its rules and customs if his dealings are to be allowed and receive its recognition. It follows that a person who wishes to employ a stockbroker in his capacity of member of a Stock Exchange must do so in such a way that the stockbroker's acts under employment can conform to the rules and customs of his Exchange. For this reason it seems best to state what are the main<sup>2</sup> rules and customs of American<sup>3</sup> Stock Exchanges relating to the conduct of business by their members before considering the relations of stockbrokers with their employers, who are commonly called "customers" or "clients."

1. Every Stock Exchange provides a meeting place, called "the floor" of the Exchange, where its members may transact business with one another.

2. Every Stock Exchange allows dealings on its floor only in certain kinds of securities which are selected by the governors or by a committee. Since these securities are placed, when selected, on some kind of a published list, they are known as "listed securities."<sup>4</sup>

3. Every Stock Exchange allows only certain kinds of transactions in listed securities to be made on its floor, and the way these transactions must be performed is fixed in detail by the rules and customs of each Exchange. The most important of these transac-

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<sup>1</sup> This article only deals with stockbrokers who are members of a Stock Exchange.

<sup>2</sup> These are the same on all American Stock Exchanges. The matters in which rules and customs do differ are not of a character to need particular consideration in this article.

<sup>3</sup> This article is not concerned with the rules and customs of European Stock Exchanges which are different from those of American Stock Exchanges; see Mr. George R. Gibson's book on "The Stock Exchanges of London, Paris, and New York," and his pamphlet on "The Berlin Bourse"; also Dos Passos, chaps. iv., v., vi.

<sup>4</sup> It is usual for a Stock Exchange to have a "department" of so-called "unlisted securities," in which dealings are allowed on its floor. Though the greater part of this article applies as well to "unlisted" securities as well as to "listed," it is written only with reference to the latter, and the word securities will be used only in the sense of securities which are listed on some Stock Exchange.



tions is the purchase and sale of listed securities, and the manner in which this must be performed is practically the same on all American Stock Exchanges, and is in general as follows.

By the rules of every Stock Exchange its members are only permitted to deal with one another "on the Exchange" between certain hours of every business day. Between these hours the members congregate "on the floor" of the Exchange and are permitted then and there to offer and to accept offers to buy or to sell securities for cash. These offers and acceptances are made by word of mouth or merely by customary signs. In making or accepting one of these offers a stockbroker always acts as if he were acting for himself only,<sup>1</sup> even though he may actually be acting as an agent, and thus the contract which results when an offer is accepted is on its face a contract only between the two stockbrokers.

The nature of these contracts must depend on the nature of the offers in which they originate. All these offers are of the same general description, being offers either to buy ("bids for") or offers to sell a specific amount of securities for a money price, which is understood to be payable in all cases *on the delivery of the securities*. Every offer expressly or impliedly states when such delivery shall or may be "made" by the selling stockbroker or may be "called" (demanded) by the buying stockbroker.

There is a variety of "deliveries," so called, permitted by the rules of every Stock Exchange, for any one of which either an offer to buy or an offer to sell securities may be made. The usual<sup>2</sup> "deliveries" are as follows.

(1) Offers to buy or to sell "for cash."

If an offer to buy or to sell "for cash" is accepted the rules of all Stock Exchanges fix a particular time in the same business day in which the contract is made before which delivery of the securities must be made by the seller.

(2) Offers to buy or to sell in the "regular way" or "regular."

If an offer to buy or to sell "regular" is accepted, the rules of all Stock Exchanges fix a particular time in some particular busi-

<sup>1</sup> If the stockbroker is acting for a fellow member of his Stock Exchange, he may, if such fellow member is willing, "give up" such fellow member in his place as a principal if the stockbroker with whom he is contracting does not object. If the stockbroker is acting for an outsider, he cannot give him up as a principal and at all times carefully conceals his identity. The custom of dealing in this way has been held to be "reasonable." *Whitehouse v. Moore*, 13 Abb. Pr. (N. Y.) 42; *Peckham v. Ketcham*, 10 Abb. Pr. (N. Y.) 220; *s. c.* 5 Bos. (N. Y.) 506; *Horton v. Morgan*, 19 N. Y. 170.

<sup>2</sup> All Stock Exchanges do not allow *all* of the deliveries stated in the text, though the New York Stock Exchange does.

ness day *following* the day on which the contract is made before which delivery of the securities must be made by the seller.<sup>1</sup>

(3) Offers to buy or to sell where the time of delivery is postponed until a fixed time not further off than three days.

Offers of this sort are offers to buy or to sell "at three (or two) days." If an offer of this sort is accepted, delivery of the securities must be made by the seller on the third or second day after the contract is made, as the case may be, and before a certain time on such day.

(4) Offers to buy or to sell where the time of delivery may be postponed until a fixed time not further off than three days.

Offers of this sort are offers to buy or to sell "buyer three" (days) or "seller three" (days). An offer to buy or to sell "seller three," if accepted, gives the seller the option of making delivery of the securities at any time before a fixed time on the third day after the contract is made; and an offer to buy or to sell "buyer three," if accepted, gives an option to the buyer of calling (demanding) delivery of the securities at any time before a fixed time on the third day after the contract is made.

(5) Offers to buy or to sell where the time of delivery may be postponed for longer than three days but not longer than sixty<sup>2</sup> days.

The commonest form of such offers are offers to buy or to sell securities "buyer thirty" (days) or "seller thirty" (days), or "buyer sixty" (days) or "seller sixty" (days). Such offers, if accepted, give options similar in all respects except that of length of time to those in the case of "buyer three" or "seller three." After offers of this kind are verbally made and accepted they are reduced to writing;<sup>3</sup> such written contracts are known as "Stock Exchange contracts."<sup>4</sup>

<sup>1</sup> On most Stock Exchanges it is the next business day after the day in which the contract is made.

<sup>2</sup> "Sixty days" is the longest period usually allowed by the rules of Stock Exchanges to which delivery may be postponed.

<sup>3</sup> Since these contracts are in writing, the Statute of Frauds has no application to them; with the others which remain verbal, they are taken out of the Statute by the exchange of comparison tickets between the stockbrokers, which takes place as soon as possible after the contract is made. This seems to have been overlooked in those cases in which it is stated that these verbal contracts are void in the prohibition of the Statute. See *Brownson v. Chapman*, 63 N. Y. 625; *semble* *Roger v. Gould*, 6 Hun (N. Y.), 229, and *Dos Passos*, 107, 674, 676. This question is of slight practical importance, as every Stock Exchange enforces its remedies for breach of contract (see *post*, page 440) irrespectively of the requirements of the Statute of Frauds.

<sup>4</sup> These contracts are also known as contracts for "future" delivery, in contradis-

(6) Offers to buy or to sell where the time of delivery is fixed by the happening of some future event.

Common forms of such offers are offers to buy or to sell securities "seller opening of books," "to arrive" or "when issued." If an offer of this kind is accepted, delivery of the securities must be made by the seller as soon as the event stated in the offer happens.

The nature of all the different kinds of offers permitted to be made on the floor of Stock Exchanges being described, the nature of all contracts made by the acceptance of any of such offers can now be determined. All these contracts are alike in being contracts to buy or to sell a specified amount of securities for a money price to be paid on the delivery of the securities. They differ only with respect to the time when delivery of the securities must or may be made by the seller or may be called by the buyer, and in all cases this is postponed until some time after the contract is made. In all of these contracts it is clear that the intention of the parties is to postpone the passing of the title of the securities contracted to be bought or sold until they are delivered and the purchase price paid. In no case is an immediate transfer of title contemplated. All of them look to the occurrence of this result when, and not until, they are performed, and the only difference between them is as regards the time when they are to be performed. Hence, as no actual sale of personal property can occur without a complete transfer of title from the seller to the buyer, these contracts do not constitute actual purchases and sales, but are *contracts to make purchases and sales* at the time when they are to be performed by the delivery of the securities and the payment of the purchase price. All of them are what are called "executory contracts of sale," in which the actual purchase and sale does not take place until the contract is performed. It is, however, usual for stockbrokers to call contracts to buy or to sell securities "for cash," or "regular," "purchases" or "sales," and only to call contracts where the delivery may be postponed for longer than three days, "Stock Exchange contracts" or "*contracts* for the receipt or delivery of securities." Contracts to buy or to sell securities where the time of delivery may be or is postponed until a fixed time not further off than three days stand by themselves. They are never

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tion to all other deliveries (except that numbered (6) above) which are known as "immediate," though of course this term has only a relative significance. Contracts for future delivery carry interest, and in their case a "margin" may be demanded by the rules of all Stock Exchanges by either stockbroker from the other.



called "contracts," but are usually included under the head of "purchases" or "sales."<sup>1</sup>

All these contracts have some time to be performed, and inasmuch as in contracting each of the stockbrokers acts as a principal each is legally bound<sup>2</sup> to the other to perform his part under the terms of any of these contracts. If he fails to do so, every Stock Exchange gives to the other stockbroker an effective and immediate method of liquidating his loss,<sup>3</sup> and will enforce this liquidated claim so far as it is able by suspension of the defaulting stockbroker, and the sale of his "seat" or share in the Exchange.<sup>4</sup> To facilitate stockbrokers in performing the contracts that they make, every Stock Exchange has established rules by which the performance<sup>5</sup> of all contracts made on its floor can be conveniently and expeditiously carried out. In consequence of this, every offer to buy or to sell securities, made on the floor of a Stock Exchange, is understood to contain an implied term to the effect that the contract which will result from its being accepted shall be performed according to the rules of such Stock Exchange. It is to be noted that by these rules the actual performance of any of these contracts takes place away from the Stock Exchange on the floor of which it is made. In spite of this, it is customary to speak of "buying" and "selling"<sup>6</sup> securities "on the floor" or "on the Exchange," and also of purchases and sales being made "on the floor" or "on the Exchange," where it would be more proper to speak of *contracting* to buy or to sell, and of *contracts* for the purchase and sale of securities.

<sup>1</sup> The verb generally used in all cases "to buy" or "to sell," instead of "to contract to buy" or "to contract to sell."

<sup>2</sup> Where a stockbroker contracts in his own name, even though he be actually acting for an undiscovered principal, he can sue and be sued on his contract as a principal. *Knapp v. Simon*, 96 N. Y. 284, s. c., 86 N. Y. 311; *Cobb v. Knapp*, 71 N. Y. 384; *Mechem on Agency*, §§ 929, 957, 977, 983.

<sup>3</sup> By a so-called purchase or sale "under the rule," see Constitution and Rules of the New York Stock Exchange, Art. XXIX. In consequence of this remedy it is not usual for a member of a Stock Exchange to sue another for a breach of a contract made on its floor, and suits by a customer (the undiscovered principal) against a stockbroker who has defaulted on a contract made with the customer's stockbroker are unheard of.

<sup>4</sup> On the nature of a stockbroker's seat on an Exchange, see *Dos Passos*, 17-21.

<sup>5</sup> Subject to the rules of each Stock Exchange this is done either directly by and between the two stockbrokers or through a Clearing House acting as the agent of both. On Stock Exchange Clearing Houses, see article on, by Alexander D. Noyes, in *Pol. Sc. Quarterly*, Vol. VIII. No. 2. p. 252, June, 1893. Among other matters the rules prescribe what shall be "good" delivery of securities as between two contracting stockbrokers.

<sup>6</sup> See note 1, above.

The principal rules and customs regulating the manner in which stockbrokers who are members of a Stock Exchange can deal on the floor of the Stock Exchange to which they belong for the purchase and sale of securities have now been described.

Acting in accordance with these rules and customs, stockbrokers can affect various transactions in the purchase or sale of securities for customers who may wish to employ them. The commonest of all these transactions is a simple purchase or sale of securities for a customer who has money which he wishes to invest in securities or owns securities which he wishes to dispose of.<sup>1</sup> The way this transaction is performed is as follows. The first step is for the stockbroker to contract<sup>2</sup> on the floor of the Stock Exchange to buy or to sell the securities the customer wishes bought or sold, either "for cash" or "in the regular way" as the customer may prefer. The stockbroker contracts, as has been stated, in his own name and becomes personally bound to perform the contract or contracts he makes. If he performs with the securities the customer wishes to sell or with the money he wishes to invest it is obvious the customer's desires will be fulfilled. This is the course the transaction regularly takes. For as soon as the stockbroker has contracted the customer supplies<sup>3</sup> him with the means to perform by either giving him the money to pay for the securities he has contracted to buy or the securities to deliver which he has contracted to sell. The stockbroker then performs his part of the contract or contracts he has made and should simultaneously receive from the stockbroker or stockbrokers with whom he has contracted the securities he agreed to buy or the purchase price for the securities he agreed to sell. He then accounts to the customer and gives him the money or the securities he has received. This completes the transaction so far as the purchase or sale of the securities is concerned. The stockbroker, however, must be paid for his services. Even if he were willing to act without compensation, he cannot do so, for the rules of all Stock Exchanges provide that a

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<sup>1</sup> This transaction is consequently known as a purchase or sale "for the investment account." It is proposed to confine this article to a consideration of this transaction only, and not to treat in any way of the other transactions in which a customer may engage.

<sup>2</sup> He makes one contract, or as many contracts with the same or different stockbrokers as may be necessary to carry out what the customer wants.

<sup>3</sup> He may have done so, and often is required to do so, at the very beginning of the transaction. See *post*, page 449.

stockbroker must *at least*<sup>1</sup> charge and be paid a certain fixed sum for every transaction he makes on behalf of any other person, and impose a severe penalty for any violation of this provision.<sup>2</sup> This sum is called the stockbroker's commission, and is a fixed percentage of the par value of the securities contracted to be bought or sold. It is usually provided<sup>3</sup> that the stockbroker must at least charge and be paid this commission without any manner of rebate or return, discount or allowance "on all purchases and sales" and contracts which he makes on the floor of the Stock Exchange. The words "purchases and sales" are here used in their Stock Exchange sense, and consequently the customer must in all cases be prepared to pay this commission when the stockbroker has contracted to buy or to sell. In practice, however, the stockbroker does not usually require him to pay it until he has fully performed the contract or contracts he has made. For services in performing or for unsuccessful efforts<sup>4</sup> in trying to contract the stockbroker makes no charge.

It is now proposed to consider the engagement<sup>5</sup> of a stockbroker by a customer who wishes a simple purchase or sale of securities to be effected. Since this can only be done in the way and on the terms described every engagement of a stockbroker must be adapted to meet the requirements of this way and these terms. And from this point of view the following matters are requisite to all engagements of a stockbroker to make a simple purchase or sale of securities.

1. Since the stockbroker acts as the agent of the customer, he must be vested with authority to buy or to sell the securities the customer wants in the manner described. This way naturally falls into two parts (*a*) the contracting to buy or to sell, and (*b*) the performance of the contract or contracts when made, both of which are done by the stockbroker and both of which must consequently be embraced by his authority.

2. Since the stockbroker performs with the money or securities

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<sup>1</sup> The stockbroker has the right to ask for remuneration in excess of his commission, but it is practically unheard of for him to do so.

<sup>2</sup> On a stockbroker's commission, see Dos Passos, 231-235.

<sup>3</sup> Cf. Constitution and Rules of the New York Stock Exchange, Art. XLIII. p. 67.

<sup>4</sup> Dos Passos, 233. This is the general rule respecting brokers of every kind, see *Sibbald v. The Bethlehem Iron Co.*, 83 N. Y. 378.

<sup>5</sup> The Statute of Frauds has nothing to do with the engagement of a stockbroker as agent to buy or to sell securities except in a case of a peculiar engagement not to be performed within a year.



of his customer, a requisite of his engagement is a provision for his being supplied with the money or the securities. This usually takes either the form of a deposit *at the time* the stockbroker is engaged, or, as the making of the contract or contracts is always uncertain, of an offer to supply the money or the securities on the making of the contract or contracts.

3. Since the stockbroker must be paid a commission, on terms and in amount as are fixed by the rules of his Stock Exchange, a requisite of his engagement is a provision for the payment by the customer of this commission according to the requirements of these rules.

Subject to these requisites the stockbroker may be engaged in any way he and the customer may agree upon, and all kinds of promises, provisos, and conditions may be made part of his engagement. There has been established, however, a convenient, brief, and customary way of engaging a stockbroker to carry out a simple purchase and sale of securities. This way is almost always used except where a customer is ignorant of it or peculiar circumstances exist which force the adoption of some other form of engagement. It is proposed to describe what this way is, how the transaction is carried out under its terms, and what rights it gives to the customer and to the stockbroker. It is as follows.

### *The Order.*

The first step is for the customer to give the stockbroker an "order" in the regular form.<sup>1</sup> This form is, "Buy or sell for my account and risk," followed by a statement, which is usually briefly and customarily worded, of the securities which the customer wishes to buy or to sell, and the price at which he wishes them to be bought or sold. To illustrate, a typical order in the regular form would be, "Buy for my account and risk 100 C. B. & Q. at 71."

There are a number of established customs<sup>2</sup> according to which orders in the regular form are interpreted.<sup>3</sup>

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<sup>1</sup> The word "order" will be used throughout this article as signifying only an order in the regular form. The word "order" is commonly used by stockbrokers as signifying any kind of a proposition relating to the purchase or sale of securities. Evidence is admissible to show a written order was changed by a subsequent verbal understanding. *Clarke v. Meigs*, 10 Bosw. (N. Y.) 337; *Bickett v. Taylor*, 55 How. Pr. (N. Y.) 188.

<sup>2</sup> These customs apply to other things besides orders in the regular form, for instance the notices (see *post*, p. 453) given by stockbrokers to their customers; but for the purposes of this article the exact scope of these customs need not be considered.

<sup>3</sup> While the adjudications of courts of law on the question of how far the engage-

With regard to the word with which every such order begins, to wit, "Buy" or "Sell," the following custom is established.

The word "buy" or "sell," as used in an order in the regular form given to a stockbroker who is a member of a Stock Exchange, is taken to mean "contract to buy" or "contract to sell"<sup>1</sup> on the Stock Exchange of which you are a member<sup>2</sup> according to its rules and customs."

With regard to the words "for me and at my risk" or "for my account and risk," which follow the word "buy" or "sell" in an order in the regular form, their meaning and the customs which apply to them are as follows.

1. The words "for me" or "for my account" mean that the contract the stockbroker is directed to make is to be made for and on behalf of the customer.

2. The words "at my risk" have the customary significance that the customer assumes the risk of any failure to perform on the part of the stockbroker or stockbrokers with whom his stockbroker contracts, and that he does not require the latter to guarantee in any way that the contract or contracts which he makes will be performed by the stockbroker or stockbrokers with whom he contracts. If these words are omitted in an order, as they may be, they are implied by force of custom.

With regard to the kind of contract the stockbroker is to make, the following custom has been established.

If an order in the regular form does not state a particular delivery for which the securities are (to be contracted) to be bought

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ments of stockbrokers are to be interpreted by the customs of their business are unsatisfactory, it is absolutely clear that an order in the regular form will receive its customary significance. The law is clear that where a *general* authority to buy or to sell personal property is given *without restrictions* to a person engaged in a particular trade, it will be interpreted according to the customs of that trade; Mechem on Agency, §§ 362, 940, 946, 948; for a large collection of cases on the interpretation of the engagements of stockbrokers according to custom and an intelligent discussion of this question, see Dos Passos, Chap. VII. p. 341. See also *Harris v. Tumbridge*, 83 N. Y. 92, aff. 8 Abb. N. C. (N. Y.) 291; *Horton v. Morgan*, 19 N. Y. 170; *Whitehouse v. Moore*, 13 Abb. Pr. Rep. (N. Y.) 142; *Skiff v. Stoddard*, 21 Law Rep. Ann. 102, on p. 112; cf. also *Daylight Burner Co. v. Odlin*, 51 N. H. 56; *Putnam v. French*, 53 Vt. 402.

<sup>1</sup> See *ante*, page 440, note 1.

<sup>2</sup> For two cases illustrating the nature and extent of this custom, see *Rosenstock v. Tormey*, 32 Md. 169; and *Porter v. Wormser*, 94 N. Y. 341; see also Dos Passos, 206-212.

or sold, it is taken to mean that they shall be contracted to be bought or sold for "regular" delivery.

With regard to the statement of the amount and kind of the securities to be bought or sold, the following customs have been established.

1. If an order in the regular form simply states a number before the name of a corporation, as, "Sell for my account and risk 100 Union Pacific Ry.," the number in question is taken to mean the number of shares of the capital stock of the corporation named which shall be contracted to be bought or sold.

2. There are in common use among stockbrokers a large number of abbreviations of the full names of corporations and for various kinds of securities. If any of these abbreviations are used in an order in the regular form, they are taken for what they stand for to stockbrokers.

With regard to the statement of the price for which securities are ordered to be bought or sold, the following customs have been established.

1. If an order in the regular form simply states a number at which a number of bonds or shares of stock is to be bought or sold, as, "Sell for my account and risk 100 Erie at 13," the number in question is taken to mean the number of dollars for which each hundred dollars' worth of the par value of the bonds or stock shall be contracted to be bought or sold.<sup>1</sup>

2. If an order in the regular form does not state the price for which securities are (to be contracted) to be bought or sold, the order is taken to mean that the securities shall be contracted to be bought or sold at the "market price."<sup>2</sup>

All the customs according to which what is expressed in an order in the regular form is interpreted have now been stated. But for them an order like, "Buy for my account and risk 100

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<sup>1</sup> The reason for this custom is that stocks and bonds are contracted to be bought and sold on the floor of a Stock Exchange for so much for each hundred dollars' worth of the par value.

<sup>2</sup> Dos Passos, 119, 182. The "market price" is understood to be the best price (*i. e.* highest in case of a sale, lowest in case of a purchase) which the stockbroker can obtain as soon as possible after the order is given. This custom is in accordance with the usual rules of law for interpreting an authority to buy or to sell where no price at which the agent shall buy or sell is fixed. See Mechem on Agency, §§ 946, 362; also *Bigelow v. Walker*, 24 Vt. 149.



C. B. & Q. at 71," would be unintelligible, but when interpreted by them it is perfectly clear and becomes, "I order you to contract to buy for regular delivery for me and at my risk on the Stock Exchange of which you are a member, according to its rules and customs, 100 shares of the stock of the Chicago, Burlington, and Quincy Railroad at 71 dollars for every hundred dollars' worth of the par value of stock."

Since this order is typical of all orders in the regular form, it is possible, now that its exact meaning has been shown, to determine what is the legal significance of all orders in the regular form.

1. *Of what is expressed* in an order in the regular form, the legal effect is that of a proposition to confer upon the stockbroker an authority to contract<sup>1</sup> to buy or to sell according to the rules and customs of the Stock Exchange of which he is a member.

2. Besides this express proposition, there is also to be found in an order in regular form an implied proposition to vest the stockbroker with authority to perform in the way established by the rules of his Exchange the contract or contracts he makes to carry out the order.<sup>2</sup> The ground for<sup>3</sup> this implication is that the customer must be held to propose to authorize the necessary consequences of what he expressly proposes to authorize, and personal performance by the stockbroker of the contract or contracts he makes is a necessary consequence of making it or them, as it is expressly proposed he should do, according to the rules and customs of his Stock Exchange.

3. In addition to these two propositions to confer agencies, an order in the regular form contains an implied offer by the customer that, on condition and in consideration of the stockbroker's making the contract or contracts for which he has express author-

<sup>1</sup> This authority being "to contract," the stockbroker is authorized to carry out the order by making one contract or several contracts with one or different stockbrokers.

<sup>2</sup> This authority is general, and the stockbroker can perform with his own money or securities, if he wants to, or in case the customer fails to supply him with the means to perform. *Knapp v. Simon*, 96 N. Y. 284, s. c. 86 N. Y. 311; *Cobb v. Knapp*, 71 N. Y. 384; *Markham v. Jaudon*, 49 Barb. (N. Y.) 462, by Leonard, P. J., on p. 465; *Sistare v. Best*, 16 Hun (N. Y.) 611; *Rosenstock v. Tormey*, 32 Md. 169, s. c. 3 Am. Rep. 126; *Giddings v. Sears*, 103 Mass 311; *Mechem on Agency*, §§ 977, 365; *Daylight Burner Co. v. Odlin*, 51 N. H. 56; *Bennett v. Covington*, 22 Fed. Rep. 816; *Putnam v. French*, 53 Vt. 402.

<sup>3</sup> A further ground lies in a deposit with the stockbroker of the means to perform, which is often made at the time the order is given.

ity, the customer will supply<sup>1</sup> him with the means to perform it or them, and will reimburse and indemnify<sup>2</sup> him for all outlays,<sup>2</sup> expenses,<sup>3</sup> and losses<sup>4</sup> necessarily or unavoidably incurred through the carrying out of the order. This offer remains unaffected<sup>5</sup> by anything the stockbroker may do until he has actually contracted to buy or to sell the securities, when it ripens into a promise and the customer becomes contractually bound. The ground for implying this offer is (a) because it is the purpose of the transaction that the customer should furnish the means to perform, and (b) because the stockbroker acts only *on behalf* of the customer.

4. An order in the regular form says nothing about the stockbroker's commission. Yet a provision for its payment in accordance with the rules of the Stock Exchange, to which the stockbroker belongs, is a requisite of his engagement. This is, however, secured by the following custom.

An order in the regular form is understood to contain an implied offer by the customer to pay the stockbroker a commission in accordance with the requirements of the rules of the Stock Exchange.<sup>6</sup>

These requirements have been shown to be that the stockbroker shall be paid a fixed commission for every contract he makes. Hence the customer's implied offer is to pay the stockbroker the usual commission on and in consideration of the making of the contract or contracts he makes to carry out the order. This offer

<sup>1</sup> See authorities cited in note 2 to page 446, and in note 2 below. The offer to supply the means to perform is really a deduction from the offer to indemnify, and where the means are supplied at the time the order is given, it does not exist.

<sup>2</sup> Dos Passos, 129-135; *Duncan v. Hill*, L. R. 8 Ex. 242, revg. L. R. 6 Ex. 255; *Mechem on Agency*, § 977. This offer protects the stockbroker in case he volunteers or is compelled to perform with his own money or securities. See *ante*, page 446, note 2.

<sup>3</sup> Dos Passos, 159; *Marye v. Strouse*, 5 Fed. Rep. 483; *Mechem on Agency*, § 977.

<sup>4</sup> The customer must indemnify the stockbroker for any losses incurred through selling spurious securities. *Maitland v. Marvin*, 86 Pa. St. 120; *Young v. Cole*, 3 Bing. N. C. 724; *Mechem on Agency*, § 977.

<sup>5</sup> The stockbroker's efforts to execute his authority to contract are of no concern to the customer, and he is not responsible for any expenses incurred in relation thereto. *Mechem on Agency*, § 978; cf. *Sibbald v. The Bethlehem Iron Co.*, 83 N. Y. 378.

<sup>6</sup> Dos Passos, etc., 231, 232. Cf. "Where there is no express agreement as to the compensation of an agent, usage if any will determine what he should receive." *United States v. Duval*, Gilp. 356; *Morgan v. Mason*, 4 E. D. Smith (N. Y.) 636; *Mechem on Agency*, § 963. Thus the question of whether the stockbroker has earned his commission is easy of determination, and the difficulties which arise with it in the case of real estate brokers do not exist. *Mechem*, § 965.

remains as made, and unaffected by anything the stockbroker may do, until he has actually contracted to buy or to sell the securities. Then, by the performance of what the customer offered to pay for, the customer's offer to pay a commission ripens into a promise to do so. In this way a contract springs into existence binding the customer to pay the fixed commission. This contract is of the unilateral or executed variety.

The express and implied terms of an order in the regular form have now been stated.

### *The "Taking" of an Order.*

After an order in the regular form is given to a stockbroker, the next step in the regular way of engaging him is for him to decide whether he will refuse<sup>1</sup> or consent<sup>1</sup> to undertake the express and implied propositions contained in the order to authorize him to contract, according to the rules and customs of his Stock Exchange, and to perform in the regular way the contract or contracts he makes to carry out the order. Since the latter is necessarily involved in the former, he cannot consent to the one without consenting to the other. If he consents to an order he is said to "take" the order. He is under no legal obligation to take every order given to him and can refuse any order he wants to. He is not bound to communicate his consent or refusal to the customer and can leave the one or the other to be inferred<sup>2</sup> from his conduct. Since it is very easy, except in clear cases, for error to arise in the making of this inference, the wiser course is for the stockbroker to communicate his consent or refusal to the customer.<sup>3</sup> This is practically essential in the case of an intended refusal, for from silence after receiving an order consent rather than refusal will usually be inferred. In communicating his refusal or consent he can express the one or the other in any way he likes. Before consenting to an order the stockbroker should make demand for

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<sup>1</sup> Where a proposition to confer an authority is made, all that is required to create the relation of principal and agent between the proposer and the person to whom the proposition is made is that the latter should consent to the proposition. His consent need not be necessarily communicated to the proposer, and it may be inferred from his conduct. *Mechem on Agency*, § 108.

<sup>2</sup> See note 1.

<sup>3</sup> The practical wisdom of notifying the customer that an order is refused has led some stockbrokers to think they are "bound" to do so, and they act accordingly; but the text states the law correctly, and there does not seem to be any established custom of notifying a customer of the refusal of an order.



any terms he may wish to make part of his engagement. Thus, it is usual for the stockbroker, unless he has entire confidence in the customer's responsibility, to ask the customer to deposit with him the securities the customer wants to sell or the money he wants to invest.<sup>1</sup>

The legal effect of "taking" an order<sup>2</sup> is to constitute the stockbroker the customer's agent, and to vest in him an authority to contract on behalf of the customer to buy or to sell securities in the way and on the terms stated in the order and also an authority to perform in the regular way the contract or contracts if made. As soon as the stockbroker becomes the customer's agent, the law imposes the duty<sup>3</sup> upon him of acting in good faith<sup>4</sup> and with due care<sup>5</sup> in relation to his principal, the customer.

In addition to merely *consenting* to an order, the stockbroker may expressly *promise* in consideration of the customer's giving him the order to act as the customer's agent.<sup>6</sup> It is not usual to find such a promise expressed in words, but it is usual for courts of law to imply it in all cases where an order is "taken." It can,

<sup>1</sup> If the order is not carried out, the stockbroker must of course at once return to the customer the securities or money deposited with him.

<sup>2</sup> Taking an order has no effect on the implied offers contained in the order; as already stated, they remain mere offers until the stockbroker has actually contracted to buy or to sell the securities.

<sup>3</sup> *Harris v. Tumbridge*, 83 N. Y. 92; *Mechem on Agency*, §§ 951-954, 454-472. This duty depends on the stockbroker's status as agent, and the remedy for any breach lies in tort.

<sup>4</sup> This duty is very stringently enforced. In doing so judges incline to lay down general rules of conduct rather than to decide each case on its merits. Thus the rule is established and enforced without exception that a stockbroker cannot sell to or buy from himself; *Porter v. Wormser*, 94 N. Y. 431; *Levy v. Loeb*, 89 N. Y. 386; s. c. 85 N. Y. 365; 47 N. Y. Super. Ct. 61; *Taussig v. Hart*, 58 N. Y. 425; *Day v. Holmes*, 103 Mass. 306; — his clerk; *Gardner v. Ogden*, 22 N. Y. 327; — a firm or corporation of which he is a member; *Francis v. Kerker*, 85 Ill. 190; *Solomons v. Pender*, 3 H. & C. 639; — and this without proof of fraud; *Porter v. Wormser*, 94 N. Y. 431; *Gardner v. Ogden*, 22 N. Y. 327; — and even in case where the price obtained or given by the customer is as good or better than would otherwise have been obtained or paid; *Taussig v. Hart*, 58 N. Y. 425; *Gardner v. Ogden*, 22 N. Y. 327; *Connor v. Black*, 24 S. W. (Mo.) Rep. 184. There is no custom among stockbrokers of violating this rule of law; cf. *Robinson v. Mollett*, L. R. 7 H. L. App. Cases, 802. On this whole note, see *Dos Passos*, 123, 124, 213-226, 280-286; *Mechem on Agency*, § 936, and cases cited.

<sup>5</sup> The degree of care which a stockbroker must show is to be measured by the standard of care which a faithful and intelligent stockbroker would show. It is not to be measured by the degree of care which is customary, or which stockbrokers usually give, unless such degree of care is what an intelligent and faithful stockbroker would show. Cf. *William v. Hays*, 143 N. Y., 442, on pp. 453, 454; *Dos Passos* 123-136.

<sup>6</sup> This makes an ordinary unilateral contract of agency.

however, be properly implied only in a case where there is communication<sup>1</sup> between the stockbroker and the customer, on the taking of the order, sufficient to warrant the implication. This is often absent, as where an order is sent by mail and the stockbroker, without notifying the customer of his taking the order, at once proceeds to carry it out, and in such a case no such promise can be implied. The effect of such a promise is to add to the duty of acting in good faith and with due care, which springs from the stockbroker's status as agent, a contractual obligation of the same import.

It is to be noticed that neither the stockbroker's duty as agent nor this contractual obligation bind him so that he will incur any liability if he is unable through no carelessness or fault of his own to carry out the order. Such a liability would be incurred, however, if he should promise to carry out the order, but inasmuch as an order is carried out by the making of one or more contracts, each of which depends on the meeting of the minds of two persons, the stockbroker will not except in very rare cases expressly give such a promise, and a promise to this effect can never be implied from the ordinary facts surrounding and constituting the "taking" of an order in the regular form.<sup>2</sup>

"Taking" the order completes the engagement of the stockbroker in the regular way. All there is to this way can now be seen to be the creation of two agencies, one to contract and the other to perform the contract or contracts made to carry out the order, coupled with an offer to pay a commission on the making of the contract or contracts, and an offer to indemnify the stockbroker, which, where the means to perform the contract or contracts are not deposited at the time the order is given, gives rise to an offer to supply the securities to be sold or the money to be invested when the contract or contracts is or are made.

### *The "Execution" of the Order.*

The scope of every authority is measured by the principal's intent, and only when the agent acts within this scope does he bind the principal. This is the general rule, and is without exception.

For the purposes of this article the intent of a customer in giv-

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<sup>1</sup> A contract implied in fact is as dependent on communication of some kind between the offeror and offeree as an express contract.

<sup>2</sup> Cf. *Fletcher v. Marshall*, 15 M. & W. 755; *Dos Passos*, 120.

ing an order in the regular form is assumed to be to vest the stockbroker, if he takes the order, with such an authority as is to be found in the order when interpreted by the customs which have been stated, and consequently with an authority to contract to buy or to sell securities of the kind and in the amount and at the price stated in the order according to the rules and customs of the Stock Exchange of which the stockbroker is a member, and with an authority to perform in the regular way the contract or contracts made to carry out the order.

This authority to perform does not come into existence unless and until the authority to contract is executed. With regard to the execution of the authority to contract, only a few words need be devoted.

The stockbroker must act in good faith<sup>1</sup> and with due care<sup>1</sup> and unless given discretion<sup>2</sup> cannot vary<sup>3</sup> from the terms of the order even where he benefits<sup>4</sup> the customer by so doing. With regard to the manner<sup>5</sup> in which the stockbroker should contract,

<sup>1</sup> See *ante*, p. 449, notes 3, 4, and 5.

<sup>2</sup> *Allen v. McConihe*, 12 N. Y. Supp. 232. As to what phrase will give him a discretionary power: "Do the best you can for me," see *Covell v. Loud*, 135 Mass. 41, s. c. 46 Am. Rep. 446; "You must take care of yourselves," see *Cameron v. Durkheim*, 55 N. Y. 425; cf. also *Billingslea v. Smith*, 77 Md. 504. Good intentions on the stockbroker's part are no excuse in law for failure to carry out orders. *Allen v. McConihe*, 12 N. Y. Supp. 232.

<sup>3</sup> If any part of the transaction is not carried out according to the customer's intention he is not bound by it. *Allen v. McConihe*, 124 N. Y. 342; *Campbell v. Wright*, 118 N. Y. 594; *Scott v. Rogers*, 31 N. Y. 676; *Gruman v. Smith*, 81 N. Y. 25. He need not in law take any steps to assert this. *Allen v. McConihe*, 124 N. Y. 342; *Gregory v. Wendell*, 40 Mich. 432. But if it does occur he should at once on learning of it give notice to the stockbroker that he repudiates what has been done contrary to his intention. *Baker v. Drake*, 53 N. Y. 211; *Hanks v. Drake*, 49 Barb. (N. Y.) 186. The reason for the customer's repudiating anything done contrary to his intention is as follows. The customer has the right to ratify anything done contrary to his intention. *Gillette v. Whiting*, 120 N. Y. 402; *Harris v. Tumbridge*, 83 N. Y. 92; *Taussig v. Hart*, 49 N. Y. 301; *Brass v. Worth*, 40 Barb. (N. Y.) 648; *Dos Passos*, 212. And his ratification makes the matter ratified as if it had been originally authorized. *Mechem on Agency*, §§ 110, 167. Silence on the customer's part after notice of an act done contrary to his intention is evidence of ratification, and hence, to prevent a "ratification by silence," he should repudiate any act done contrary to his intention as soon as brought to his notice.

<sup>4</sup> Unless the customer ratifies and accepts it. Thus the stockbroker has no right to buy or to sell, where the price is fixed, at a better price. *Nesbitt v. Helsner*, 49 Mo. 383; *Smith v. Bouvier*, 70 Pa. St. 325; *Borham v. Godfrey*, 1 Knapp, 381; *Dos Passos*, 167.

<sup>5</sup> In spite of the maxim *Delegata potestas non potest delegari*, custom permits a stockbroker to delegate the execution of an order to some other stockbroker. *Dos Passos*, etc., 104, 230, 231; *Green v. Johnson*, 90 Pa. St. 38; *Gregory v. Wendell*, 40 Mich. 432;



it need not be described here, for it would be merely restating what has already been stated at the beginning of this article in the description there given of the way stockbrokers deal together according to the rules and customs of the Stock Exchange to which they belong. As already indicated, the stockbroker can make one contract, or as many contracts with the same or different stockbrokers as he deems advisable,<sup>1</sup> provided that the total amount<sup>2</sup> of securities bought or sold shall be the amount stated in the order. In so contracting the stockbroker can either make an offer or offers to be accepted, or accept an offer or offers made by another stockbroker or other stockbrokers, provided that the offer or offers if accepted will result in contracting to buy or to sell securities according to the terms of the customer's order. With regard to the matters of price, amount,<sup>2</sup> and kind of securities, the stockbroker must carry out the order exactly.<sup>3</sup> If in any case a stockbroker succeeds<sup>4</sup> in *contracting to buy or to sell as he is ordered* to, he is said to have "executed" the order, and the order is said to be or to have been "executed."<sup>5</sup>

What the stockbroker has to do to execute the order has been stated, and the next question is, When must he do it? Since the stockbroker at the time he takes the order does not usually promise

Rosenstock v. Tormey, 32 Md. 169. So the stockbroker can delegate to his clerk the doing of the acts constituting performance of the contract or contracts made. Mechem on Agency, § 944. Where, however, anything is left to the stockbroker's discretion, he must exercise his personal judgment. Simms v. May, 16 N. Y. St. Rep. 780.

<sup>1</sup> His authority being "to contract."

<sup>2</sup> No custom exists allowing a stockbroker to contract to buy or to sell a less amount of securities than he is ordered to in a case where no discretion is given to him to do so. This discretion is, however, usually given with all orders to buy or to sell more than 100 shares or 10 bonds, and the number of shares or bonds stated in the order is in such case treated as a limit. Dos Passos, 119, 120; Marye v. Strouse, 5 Fed. Rep. 483; where the discretion is given, the order is said to be "executed" for as many shares or bonds as are contracted to be bought or sold.

<sup>3</sup> An order to purchase at  $57\frac{1}{8}$  is not fulfilled by a purchase at  $57\frac{7}{8}$  or 58. Genin v. Isaacson, 6 N. Y. Leg. Obs. 213. Cf. Day v. Holmes, 103 Mass. 306, and Pickering v. Demeritt, 100 Mass. 416. The same thing would be true of an order to sell. An order to buy "regular" is not fulfilled by a purchase at thirty days seller's option. Taussig v. Hart, 58 N. Y. 425. An order to sell wheat on a *particular* day is not fulfilled by a sale on the following day. Scott v. Rogers, 31 N. Y. 676.

<sup>4</sup> Until the stockbroker has done something to bind the customer, viz. "execute" the order, an order can be revoked. Dos Passos, etc., 120, 121, 165. On the general principles governing the revocation of orders given to brokers, see Sibbald v. The Bethlehem Iron Co., 83 N. Y. 378; Mechem on Agency, §§ 204, 968.

<sup>5</sup> Consequently the performance of the contract or contracts is not included, technically speaking, in the "execution" of an order.

that he will carry out the order, it might be thought that the customer was exposed to the danger of the stockbroker taking an order and making no effort to carry it out. This danger does not, however, exist. It is overcome by the following customs.

1. An order to buy or to sell securities can only be executed, if at all, on the day it is given, unless it is expressly stated in the order that it is "good" for a longer period<sup>1</sup> of time or for some particular period of time.<sup>2</sup>

2. Unless precluded by the terms of an order to buy or to sell securities, there is implied as a term or condition of the agency conferred by the order that the stockbroker shall try to execute the order as early in the time for which it is "good" as it is possible for him to do in accordance with the rules and customs of the Stock Exchange to which he belongs.

These customs will be enforced<sup>3</sup> by courts of law, and if the stockbroker does not comply with them it will be considered a breach of his duty to act with due care.

### *The Notice.*

As soon as he can after executing an order the stockbroker should communicate the fact that he has done so to the customer. This duty is established by custom and will be enforced<sup>4</sup> by courts of law. The stockbroker need not follow any particular form in making this communication. It is usual, however, to make it in the form of a written notice.<sup>5</sup> This notice states in a brief form exactly what kind of contract or contracts the stockbroker has made, and gives in addition the name of the stockbroker or stockbrokers with whom the contract or contracts has or have been made. As regards the wording of such a notice, the same customs which affect the interpretation of the terms of an order apply in

<sup>1</sup> This custom is opposed to the rule that an authority is good till countermanded, if such a rule exists. Cf. *Dickenson v. Tilwall*, 1 Stark. 128, s. c. 4 Campb. 279. Mr. Dos Passos seems to be ignorant of this custom. *Dos Passos*, 120.

<sup>2</sup> In such a case it is usually made "good till countermanded," which is usually abbreviated, when written, to G. T. C.

<sup>3</sup> See *ante*, page 443, note 3.

<sup>4</sup> *Finney v. Gallaudet*, 15 Daly (N. Y.), 66; *Hoffman v. Livingstone*, 46 N. Y. Super. Ct. 552; *Cameron v. Durkheim*, 55 N. Y. 425; *Dos Passos*, 190. The stockbroker is permitted to give evidence that a notice contained errors. *Porter v. Wormser*, 96 N. Y. 431.

<sup>5</sup> See *ante*, p. 443, note 3.

the same way, *mutatis mutandis*, as they do to an order. Since these customs have been stated, they need not be repeated here. A notice which would be typical would read, "I have bought for your account and risk 100 C. B. & Q. at 71 from Brown." The notice must be given to the customer in such a way as that knowledge of its contents can be imputed fairly to him. To do this it would be held in most jurisdictions that mailing to the customer the notice properly addressed and postage prepaid, or leaving it at his business office or home, was sufficient, without proof that the notice reached him, where there was no evidence that it did *not* reach him.<sup>1</sup>

The legal nature of the obligation imposed by the custom requiring the stockbroker to give this notice to the customer is difficult to determine. It may be considered that the giving of the notice is a condition of the customer's offer to pay a commission,<sup>2</sup> or that it is independent of the customer's offer, and is a part of the stockbroker's duty as agent which does not come into existence until the order has been executed and the commission earned. The latter view seems to be the correct one, and to have been adopted in the case of *Hoffman v. Livingstone*,<sup>3</sup> the only case on this question. That it is the only case shows of what little importance this question is. The practical necessities of notifying the customer are so great that the stockbroker will not neglect it.

If the former view is taken, the customer's offer to pay a commission does not ripen into a promise until he has been notified; if the latter, it ripens into a promise as soon as the order is executed. At the one time or the other the customer is bound to

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<sup>1</sup> In *Granite Bank v. Ayers*, 33 Mass. 392, Shaw, C. J., lays down the rule that "all notices at one's domicile, and all notices respecting transactions of a commercial nature at one's known place of business, are deemed in law to be a good constructive notice, and to have the legal effect of actual notice." Subject to this rule of law, the question whether the customer was notified or not is a question for the jury. *Minor v. Beveridge*, 141 N. Y. 399.

<sup>2</sup> Cf. such cases as *Ramsgate Victoria Hotel Co. Lim. v. Montefiore*, L. R. 1 Ex. 109, and *In re National Savings Bank Association*; *Hebb's Case*, L. R. 4 Eq. 9. If this view is taken of the duty to give notice, it would seem that logically the customer could revoke his order until the notice was given him; but whatever consequences are to be given to such a revocation, the customer cannot relieve himself from being bound by the execution of the order, if the stockbroker has done so before the revocation takes place, inasmuch as, in executing the order, the stockbroker acts as agent for the customer, and binds him by his acts.

<sup>3</sup> 46 N. Y. Superior Court, where it was decided that a failure to give this notice was such "negligence" on the part of the stockbroker as to preclude him from recovering his commissions.



pay the commission, but it matters little which time, for there is no obligation upon him to actually pay it until the stockbroker asks for it. In the case of a purchase of securities the stockbroker may demand his commission at any time that is convenient to him, but in the case of a sale of securities the custom is for him to wait until he has received the purchase price from the buyer, and then to deduct his commission from it before turning it over to his customer.

### *The Performance of the Contract.*

If the stockbroker has not previously demanded and received from the customer the means to perform the contract or contracts he has made, he will demand them at the time he notifies the customer of the "execution" of the order, or as soon thereafter as he needs them. The customer is bound<sup>1</sup> to comply with this demand by reason of his offer, already described, to do so, in consideration of the execution of the order.

As already stated, the stockbroker has authority to perform in the regular way the contract or contracts he has made, which authority is dormant till the contract or contracts is or are made, and comes to nothing if the stockbroker fails to "execute" the order.

In carrying out this authority the stockbroker<sup>2</sup> must act in good faith and with due care towards his customer. As already stated, this duty is created by "taking" the order, and where at that time there is no communication from the stockbroker to the customer it can only rest on his status as agent, and no contractual obligation to act as the customer's agent can be implied. But a contractual obligation can be implied, and will usually be implied from the deposit of the means to perform by the customer after the "execution" of the order at the stockbroker's implied or express request.

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<sup>1</sup> If the customer fails to supply the means to perform, the stockbroker can perform with his own means. See *ante*, p. 446, note 2. In such a case, the stockbroker can, if he has bought securities, resell them without notice or tender, and charge the customer with the loss, if any. *Knapp v. Simon*, 96 N. Y. 284, s. c. 86 N. Y. 311; *Whitehouse v. Moore*, 13 Abb. Pr. (N. Y.) 142; *Markham v. Jaudon*, 49 Barb. (N. Y.) 462, on p. 465; or he can hold the stock for the customer's account, and sue for what he had to pay, *i. e.*, the original purchase price. *Giddings v. Sears*, 103 Mass. 311; *Knapp v. Simon*, 96 N. Y. 284, s. c. 86 N. Y. 311; *Bennett v. Covington*, 22 Fed. Rep. 816.

<sup>2</sup> This duty is not affected by the fact that for acting as agent in performing, the stockbroker receives no pay. *Isham v. Post*, 141 N. Y. 100.

This really constitutes a second agency to perform in the regular way. It is not usual to find an express promise that the stockbroker will act as the customer's agent in performing. Nor is it usual to find at any point in the engagement of the stockbroker any express obligation binding him to perform the contract. It might be thought requisite that such an obligation should be created. If it were required it would be for the customer's protection, and it is not necessary for that. First, because of the stockbroker's duty to act in good faith and with due care, which arises, as has been stated, from his agency to perform; and secondly, because the stockbroker, in order to relieve himself from the personal liability he assumes in contracting as he does in his own name, is always ready, without being under any obligation to the customer to do so, to perform any contract he may make on behalf of a customer if the customer supplies him with the means to do so.

It does not seem necessary to describe the actual steps the stockbroker takes to perform in the regular way a contract or contracts he has made on behalf of a customer. On performing he must of course receive the securities which he contracted to buy where the customer ordered securities bought, and the price in money he contracted to sell for where the customer ordered securities sold.<sup>1</sup> Since he actually receives these as the agent of his customer, it is part of his duties to account<sup>2</sup> for them promptly to the customer. This completes the transaction.

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<sup>1</sup> It is said that, as "brokers" do not have their principals' property intrusted to them, they have no lien. *Mechem on Agency*, § 979. But as *stockbrokers* do have their principals' property delivered to them, it would seem that they, like factors, to whom in many respects they may be compared, have a lien for their commissions, etc.

<sup>2</sup> On the duty to account, see *Mechem on Agency*, §§ 955, 522. It is part of the stockbroker's duty, where he buys shares, to have them transferred into the customer's name. On what will excuse him from so doing, see *Horton v. Morgan*, 19 N. Y. 170.

## VOLENTI NON FIT INJURIA IN ACTIONS OF NEGLIGENCE.

### PROPER RELATIONS OF THE DOCTRINE.

IN the well-known words of Baron Alderson,<sup>1</sup> "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do,"—"provided, of course, that the party whose conduct is in question is already in a situation that brings him under the duty of taking care," is the necessary qualification made by Pollock.<sup>2</sup>

Smith defines negligence as being "a breach of duty unintentional, and proximately producing injury to another possessing equal rights."<sup>3</sup>

Beven says, "Negligence is the failure to bestow the care and skill which the situation demands."<sup>4</sup>

Each of these definitions falls back upon some "duty" as the ultimate test, and no one is complete until further explanation is given as to what gives rise to the duty. The principle laid down by Brett, M. R.,<sup>5</sup> is probably the best general expression of the foundation of duty: "Whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think, would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause<sup>6</sup> danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger."<sup>7</sup>

There is no such thing, then, as negligence in the abstract, but the terms "negligence" and "duty" are correlative. Whenever neg-

<sup>1</sup> *Blyth v. Birmingham Water Works Co.*, 11 Exch. 784 (1856).

<sup>2</sup> Pollock on Torts, p. 354.

<sup>4</sup> Beven on Negligence, p. 345.

<sup>3</sup> Smith on Negligence, p. 6.

<sup>5</sup> *Heaven v. Pender*, 11 Q. B. D. 508 (1883).

<sup>6</sup> Should not this be amended, "he would reasonably and probably cause"?

<sup>7</sup> It should be noticed that this proposition may be somewhat too wide. This duty cannot be applied to persons in the natural user of their land. Cf. Clerk and Lindsell on Torts, p. 361.



ligence is charged the test is what duty there was on the part of the person charged towards the special person complaining, and what was its extent at the time and under the particular circumstances. The duty imposed upon a man to exercise care towards another must vary according to the character of the danger, whether hidden or obvious, great or small, and according to the relation between the two men.<sup>1</sup> The same act may be negligent as against one man, and not as against another. In a given suit, therefore, for negligence, the defendant's duty to the plaintiff at the particular time of the injury is the sole thing to be considered, and not his general duty to others.<sup>2</sup>

The plaintiff in an action of tort for negligence must allege and prove a duty on the part of the defendant towards him, and a failure to perform. This proves the negligence. To show that it was actionable, he must go farther, and show that this failure was the proximate cause of the injury.

The defendant in such action has two distinct defences:—

I. To deny that his act caused the damage at all, although admitting the duty, (*a*) because of an intervening act of some one, or an intervening effect of something, breaking the causal connection between the defendant's act and the injury; (*b*) because of some act of the plaintiff's himself occurring simultaneously or subsequently to the defendant's act, breaking the causal connection and rendering the defendant's act no longer the *sole* proximate cause of the injury.

II. To admit that his act caused the damage, but to deny the duty, (*a*) because no duty was imposed by law upon persons standing in the relative positions of the parties,—as, for instance, where the plaintiff is a trespasser, or, where he is not such a person as the defendant was bound to anticipate would be likely to incur the danger; (*b*) because the plaintiff himself had voluntarily placed himself in such a position that no duty arose as towards him.

Now, these two defences are entirely distinct, the first admitting the negligence and denying the proximate cause, the second denying absolutely the negligence, *i. e.* the breach of duty towards the particular plaintiff. The first is a defence to the action; the second is really proof of no basis to a right of action.

The first of these defences (I. *b*) is that usually called contribu-

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<sup>1</sup> Cf. Lord Bowen in *Thomas v. Quartermaine*, 18 Q. B. D. (1886).

<sup>2</sup> *Fitzgerald v. Conn. River R. R.*, 155 Mass. 156 (1891).

tory negligence, and is expressed by the formula: "If the plaintiff by the use of due care could have avoided the consequences of the defendant's negligence, the defendant is not liable." This is on the ground that the defendant's negligent act was not the real proximate cause, or, at least in cases of concurrent negligent acts, was not the sole cause. The second of the above defences (II. *b*) is that expressed by the maxim, "*Volenti non fit injuria*;" and, as said above, it is strictly not a defence, but a rule of law regarding a plaintiff's conduct which forms a bar to a suit brought by him based on another's alleged negligence. One who knows of a danger arising from the act or omission of another, and understands the risk therefrom, and voluntarily exposes himself to it, is precluded from recovering for an injury which results from the exposure.<sup>1</sup> In other words, towards a person fully cognizant and appreciative of the danger and risk to which the defendant's conduct exposes him, the defendant has no duty of taking care, and therefore is not negligent. It is often said that the two defences above stated, the two principles, are identical; and throughout the cases there is the greatest confusion between them.<sup>2</sup> This confusion arises from the fact that in many States contributory negligence is not treated as a defence, but rather as a bar to the plaintiff's case, which he himself must remove before being able to maintain his action. Treating the defence in this way naturally breaks down the line between contributory negligence and *Volenti non fit*. Thus, in Massachusetts<sup>3</sup> and other States it is held that the plaintiff does not show the existence of a duty towards him until he first shows that he himself was in the exercise of due care. "In this view, the absence of contributory negligence becomes a part of the plaintiff's case, and should appear *prima facie* before the defendant can be called on to answer the negligence imputed to him." It is submitted, however, that this is not the true view, and that after the plaintiff has given evidence of circumstances and relations creating a duty, and a breach of that duty, this should establish a *prima facie* case for him, to which the defendant should answer. Of course the burden will always be on

<sup>1</sup> *Fitzgerald v. Conn. River R. R.*, 155 Mass. 156 (1891).

<sup>2</sup> Cf. *Smith on Negligence*, p. 159.

<sup>3</sup> Cf. *Cooley on Torts*, p. 810; among the State courts following this rule are those of Illinois, Michigan, New York, Maine, Vermont, New Jersey, Connecticut; while the true view of contributory negligence is held by the courts of England, U. S. Supreme Court, Minnesota, Wisconsin, Missouri, Pennsylvania, California.

the plaintiff to prove due care on his part, because evidence of a want of due care goes directly to disprove one essential of the plaintiff's case, *i. e.* the proximate causality of the defendant's act.

That the two defences above stated are dissimilar and distinct<sup>1</sup> will be seen on examination. Due care is taking the precautions which an ordinary reasonable, prudent man would take under the circumstances. Now, there are many undertakings attended with more or less peril which such a man in the exercise of prudence may enter upon, and does enter upon, every day. In such a case the defendant cannot say, "You are guilty of want of care in exposing yourself to the danger. You are guilty of contributory negligence." There is no negligence in the entering upon the act, it being an act often undertaken, though dangerous, by reasonable and prudent men. What the defendant can say is, however, "You may have been as careful as the most careful man; you may have done a thing that many prudent men do, but you have exposed yourself, with full knowledge and of your own accord, to a danger which I have brought about. You have hence shown that you agree to take your chances of the danger. I admit that this was not careless of you. But you did assume the risk. I therefore had no duty<sup>2</sup> towards you, and you have no action against me." Furthermore, a man, having entered upon a dangerous undertaking with eyes fully open to the danger, may use all the care in the world.<sup>3</sup> In fact, the very danger may make him even more than usually careful. In such a case contributory negligence cannot be predicated of him. The question is a larger one. "Has he voluntarily assumed the risk of the danger?" As Wharton says,<sup>4</sup> "Negligence necessarily excludes a condition of mind which is capable either of designing an injury to another or agreeing that an injury should be received from another. To contributory negligence, therefore, the maxim *Volenti non fit injuria*, does not apply, because a negligent person exercises *no will at all*."<sup>5</sup> It is evi-

<sup>1</sup> Importance of distinction is pointed out in Erle's summing up to the jury in *Indermaur v. Dames*, L. R. 1 C. P. p. 277.

<sup>2</sup> Some judges, like Esher, M. R., in *Yarmouth v. France*, 19 Q. B. D. p. 653 (1887), prefer not to say that the defendant owed the plaintiff no *duty*, but that "though he owed him a duty, the breach of this duty gives no right of action, that it is what is called a duty of imperfect obligation." This would seem to be a mere juggling with words.

<sup>3</sup> *Mimer v. Conn. River R. R.*, 153 Mass. 402 (1891).

<sup>4</sup> Wharton on Negligence, § 132.

<sup>5</sup> How badly confused the two defences may be can be seen from this extract from an otherwise admirable opinion on the subject: "It may be said that the voluntary



dent, therefore, that when the case of a plaintiff exposing himself to a known danger is given to the jury, the first question for them is not one of due care. "It may be consistent with due care to incur a known danger voluntarily and deliberately." The jury should be charged that, before investigating whether he was careless or not, they should decide whether he had consented by his action to run the chances of a fully appreciated danger voluntarily. If this is decided affirmatively there is no further need of a decision upon the plaintiff's care or want of care. If the jury finds, however, that the danger was not fully appreciated, or not undertaken voluntarily, then they should be charged to consider whether the plaintiff, in the exercise of due care, should or could have avoided the danger. In other words, a plaintiff is debarred from showing a want of contributory negligence in himself, until he first proves that he has not voluntarily run the risk.<sup>1</sup>

Of course where an absolute liability is created by statute, and an action given thereby for neglect, as in the cases under the statute liability of towns and cities for defective highways, then the primary question for the jury is one of negligence on the part of the plaintiff, because the duty and liability on the part of the defendant are already created. It is submitted that this fact has not been duly regarded, and a confusion has been introduced through the citation by the courts of cases of this nature upon the subject of *Volenti*.<sup>2</sup>

#### DEVELOPMENT OF THE DOCTRINE.

Originally, as borrowed from the old civil law, the maxim meant a defence arising from a specific assent by the party injured to a particular act, which, if done without such assent, would be a legal wrong. The scope of the defence as applied in actions for negli-

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conduct of the plaintiff in exposing himself to a known and appreciated risk, is the interposition of an act which, as between the parties, makes the defendant's act, in its aspect as negligent, no longer the proximate cause of the injury." *Fitzgerald v. Conn. River R. R.*, 155 Mass. 156 (1891). This really is a correct statement of the true rule of contributory negligence. It is not a statement of the rule of "*volenti*," as laid down in the English, and most of the other Massachusetts cases.

<sup>1</sup> Cf. *Buswell on Personal Injuries*, § 210. It is submitted that the case of *Dewire v. Bailey*, 131 Mass. 171, holding that the fact of a person entering a building with knowledge of dangerous ice on sidewalk, is not evidence conclusive of want of due care, is wrong, as not submitting first to the jury the question of assumption of risk.

<sup>2</sup> Cf. *Wilson v. Charlestown*, 8 Allen, 137 (1864); *West v. Lynn*, 110 Mass. 519 (1872); *Dewire v. Bailey*, 131 Mass. 169 (1881).

gence has been extended to conduct showing a willingness to take the chances of the defendant's action, and to run the risk, *i. e.* a general assent to a condition which may or may not give rise to the particular injury. It is sometimes said that the defence, being but a maxim, must not be arbitrarily and fixedly applied. But as Lord Bramwell said in *Smith v. Baker*,<sup>1</sup> "If this is a maxim, is it any the worse? What are maxims but the expression of that which good sense has made a rule;" and Lord Herschell, in the same case,<sup>2</sup> "The maxim is founded on good sense and justice. One who has invited or assented to an act being done towards him, cannot, when he suffers from it, complain of it as a wrong."

The defence, although well recognized in general terms throughout actions for negligence, has been expressly applied by name in very few cases until in recent years.

In actions of negligence, it first prominently appeared in the famous spring-gun case of *Ilott v. Wilkes*<sup>3</sup> (1820), where, in case of one trespassing in a wood, with notice of spring-guns set there, and being injured, Bayley, J., held, "The maxim *Volenti non fit injuria* applies, for he voluntarily exposes himself to the mischief which has happened. . . . He does it at his own peril, and must take the consequences of his own act." In *Skipp v. Eastern Counties Ry. Co.*<sup>4</sup> (1853), it was the plaintiff's duty to attach the carriages; there was evidence of danger, and that the company did not provide enough servants for the safe performance of the work. The plaintiff had been employed several months. Martin, B., held that the plaintiff had "brought the accident upon himself." Platt, B., said, "The case falls within the principle *Volenti non fit*." Martin, B., "I considered the plaintiff as a voluntary agent." In *Senior v. Ward*<sup>5</sup> (1859), the plaintiff was injured by a defective rope which by rule should have been tested by his employer, but which he knew had not been so tested, and which he was warned by the bankman to test for himself. Campbell, C. J., held, "The negligence of the plaintiff, which materially contributed to the accident, would, upon well-established principles, have deprived him of any remedy, — *Volenti non fit injuria*." In this case we meet with the confusion of ideas between the two defences of

<sup>1</sup> *Smith v. Baker*, 1891, App. Cas. 325, p. 344.

<sup>2</sup> *Idem*, p. 360.

<sup>3</sup> *Ilott v. Wilkes*, 3 B. & Ald., p. 311 (1820).

<sup>4</sup> *Skipp v. Eastern Counties Ry.*, 9 Exch. 223 (1853); *Assop v. Yates*, 2 H. & N. 768 (1858). See also *Dynen v. Leach*, 26 L. J. Exch. 221.

<sup>5</sup> *Senior v. Ward*, 1 E. & E. 385 (1859).

contributory negligence and *Volenti non fit*, which has continued throughout all the cases on employers' liability [cf. *infra*].

In *Britton v. Great Western Cotton Co.*<sup>1</sup> (1872), it was held the plaintiff must have full knowledge and understanding of the *nature* of the risk to which he was exposed. The defence was carefully discussed in an *obiter* of Lord Bramwell's in *Lax v. Darlington*<sup>2</sup> (1879). Here one of the plaintiffs' cows had met with an accident similar to the one in question some time before, and the plaintiffs chose to go to the spot with a knowledge of the danger. Lord Bramwell held that if the question had been before him he should "have had very great misgivings as to whether the plaintiffs were entitled to recover, because if they knew the amount of the danger and chose to risk it, it is their own fault. They are volunteers." He continues: "If a person choose to go out with an obvious danger before him he must take the consequence."

In *Woodley v. Met. Dist. Ry. Co.*<sup>3</sup> (1877), it was held that if a man, not the servant of the Railway Company, but of a contractor, undertakes to do work in a tunnel where he knows trains are constantly passing, he cannot complain that the railway did not warn persons of approaching trains, and by Cockburn, C. J., that the defendant was not at fault and owed no duty to the plaintiff. "If a man for the sake of the employment takes it or continues in it with a knowledge of its risks, he must trust to himself to keep clear of injury."<sup>4</sup>

It was not until after the passage of the Employers' Liability Act in England, in 1880, that the defence received its most careful consideration. As the courts held, or at least strongly intimated, that that Act took away from an employer the old defence of employee's risk, *i. e.*, that the employee assumed the obvious incidental risks of his employment, the defendants in accident cases began to urge as a defence what was really a broader application of the same doctrine. In *Thomas v. Quartermaine*<sup>5</sup> (1887), it was held by Lord Bowen (1) that in finding plaintiff not guilty of con-

<sup>1</sup> *Britton v. Great Western Cotton Co.*, L. R. 7 Exch. 130 (1872), and see *Clarke v. Holmes, Byles, J.*, 7 H. & N. 937 (1862).

<sup>2</sup> *Lax v. Corp. of Darlington*, L. R. 5 Exch. 33 (1879). See note by Lord Bramwell in Appendix of Smith on Negligence, 2d ed., and *Clayards v. Dethick*, 12 Q. B. 439 (1848).

<sup>3</sup> *Woodley v. Met. Dist. Ry. Co.*, 2 Exch. Div. 384.

<sup>4</sup> And see *Griffiths v. London & St. Katharine Docks Co.*, L. R. 12 Q. B. D. 493 (1884); L. R. 13 Q. B. D. 259.

<sup>5</sup> *Thomas v. Quartermaine*, 17 Q. B. D. 414 (1886), and 18 Q. B. D. 645.



tributory negligence the county judge left untouched the defence of *Volenti non fit*; (2) that *Volenti* was not equivalent to *scienti*; there must not only be "knowledge and perception of the danger," but also "comprehension of the risk;" (3) that when it is knowledge under circumstances that leave no inference open but one, viz. that the risk has been voluntarily encountered, the defence is complete; (4) that if the facts are undisputed it is a question of law which the court may decide, whether the risk has been voluntarily assumed; (5) that the defence *Volenti* was not taken away by the Employers' Liability Act. This case has been severely criticised by Esher, M. R., in *Yarmouth v. France*<sup>1</sup> (1887), and by Lord Herschell and Lord Watson, in *Smith v. Baker*,<sup>2</sup> on the ground that the fact of *volenti* cannot be held as a matter of law. But the case has never been overruled.

In *Membery v. G. W. Ry. Co.*<sup>3</sup> (1889, H. of L.), the plaintiff had for seven years worked at shunting of trucks, with knowledge of its danger if performed without assistance. Having asked for a boy to help him and being refused, he proceeded to shunt trucks alone. *Held*, defendant owed him no duty. Lord Herschell and Lord Halsbury agreed that the limits of the maxim must be left open for future decision.

In *Smith v. Baker* (1891), the plaintiff was employed by railway contractors to drill holes near a crane worked by other men employed by the contractors. The crane swung stones over the plaintiff's head, and the plaintiff was aware of this, and of the danger. The only point really decided was that under the circumstances of the case the question whether he had undertaken the risk was one of fact and not one of law. This was put upon various grounds by the different judges, and no definite conclusion as to the scope<sup>4</sup> of the maxim was reached.

The doctrine as established is composed of two parts; first, that plaintiff shall have full knowledge of the nature and extent of the risk; second, that he shall freely and voluntarily incur it. The necessity of the first requisite is pointed out in *Osborne v. London, & N. W. Ry. Co.*<sup>5</sup> (1888), where the plaintiff admitted that he knew

<sup>1</sup> *Yarmouth v. France*, 19 Q. B. D. 649 (1887).

<sup>2</sup> *Smith v. Baker* (1891), App. Cas. 325 (H. of L.). But see *Church v. Appleby*, 5 Times Law Rep. 88 (1888).

<sup>3</sup> *Membery v. Great Western Ry. Co.*, 14 App. Cas. 179 (1889). Cf. note in *Law Quarterly Rev.*, v. 445.

<sup>4</sup> Cf. Article on *Law Quarterly Rev.*, viii. 202.

<sup>5</sup> *Osborne v. London & N. W. Ry. Co.*, 21 Q. B. D. 224 (1888).

that the icy steps down which he went were dangerous, and that he went down carefully, holding the handrail. The jury found specifically no contributory negligence. Wills, J., held that the defence *Volenti* was not proved, as "the plaintiff may well have misapprehended the extent of the difficulty and danger which he would encounter in descending the steps; for instance, he might easily be deceived as to the condition of the snow." This requisite of the defence, as the judge pointed out, "goes far to make it hard for a defendant to succeed, . . . for it is probable that juries would often find for the plaintiffs on the ground that they had not full knowledge of the nature and extent of the risks."

The chief discussion has come upon the second part of the maxim, *i. e.* what is the meaning of the word "voluntarily"? When does a man voluntarily incur a danger? In *Thrussel v. Handyside*<sup>1</sup> (1888), where plaintiff was a carpenter, and defendant's workmen on roof above him dropped bolts, of which the plaintiff had complained before his injury, it was held that knowledge of the danger was not proof of his wilfully incurring it, and that as he was lawfully engaged on work and in danger of dismissal if he left it, the defendants were bound to use due care. It should be noticed that in this case there was no relation of any kind between plaintiff and defendant except that of location.<sup>2</sup>

It was suggested by Lindley, L. J., in *Yarmouth v. France* (1887), that the fact that a plaintiff protests against a danger, but goes on as before, is not conclusive of his assumption of it. "Fear of dismissal rather than voluntary action might properly be inferred." The opposing view is put forward by Lord Bramwell,<sup>3</sup> who says, "Are we to say, *Volenti fit injuria*, provided the plaintiff grumbles?" "Where a man can at his option do a thing or not, and he does it, the maxim applies;" and this is the view held in the Massachusetts courts.<sup>4</sup>

The law as to this point is then as yet unfixed, although there were intimations by Lord Herschell and other judges, in *Smith v. Baker*, that where a risk has been enhanced by breach of duty of the employer, a mere continuance in the service with knowledge would not debar an employee's recovery. But these opinions

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<sup>1</sup> *Thrussel v. Handyside*, 2 Q. B. D. 359 (1888). Cf. esp. note in *Law Quarterly Rev.*, iv. 239.

<sup>2</sup> See discussion of this case at end of this article.

<sup>3</sup> *Membery v. G. W. Ry.*

<sup>4</sup> *Leary v. B. & A. R. R.*, 139 Mass., p. 587.

ignore the fact that the whole question turns on just that point, whether there *is* any "breach of duty" towards any employee in such a position.

There has been some discussion, confined, however, to the English cases, as to how far a statutory duty<sup>1</sup> to guard machinery, or against danger, took away from a defendant the defence of *Volenti*.

The result of the cases seems to be that a statutory duty is not of such a nature that in no event can it be waived by conduct on the plaintiff's part. It simply places upon the defendant the burden of proving not only knowledge, but that as a matter of fact the servant has dispensed with the performance of the master's statutory duty.<sup>2</sup>

The doctrine of *Volenti* has been chiefly of importance in its application under the restricted form known as Employee's Risk.<sup>3</sup> The rule that an employee impliedly contracts to assume the obvious and incidental risks of his employment was laid down by Judge Shaw in 1842.<sup>4</sup> The reasons for the implication of such a contract have generally been held to be, (1) that an employee's compensation is regulated according to the risks;<sup>5</sup> (2) that it is public policy, the absence of remedy making the workman more careful; (3) that the servant is as likely to know and to be able to guard against the perils as the master.

As to (1), students of political economy know that as a matter of fact wages of a particular workman are not regulated in this way. As to (2), unless it is careless in a workman to try to obtain employment which may involve risk, it is hard to see why public policy demands that he should have no remedy in case of injury.<sup>6</sup>

The third reason would seem to be the true one; but there is no need of alleging an implied contractual agreement to waive

<sup>1</sup> Note, this does not refer to a statutory *liability* in action for negligence, as discussed *supra*.

<sup>2</sup> *Clark v. Holmes*, 7 H. & N. 937; (1862); *Britton v. G. W. Cotton Co.*, L. R. 7 Ex. 136, and esp. 41 L. J. Ex. 101; *Beven on Negligence*, §§ 348, 349. The case of *Baddeley v. Earl Granville*, 19 Q. B. D. 433, discussing this defence, is ill considered and a wrong statement of the law. See article in *Law Mag.*, November, 1887.

<sup>3</sup> Cf. *Mahoney v. Dore*, 155 Mass. p. 518 (1892).

<sup>4</sup> *Farwell v. B. & W. R. R.*, 4 Metc. p. 57 (1842); *Hutchinson v. York, N. & B. Ry.* 5 Exch. 351 (1850); *Seymour v. Maddox*, 16 Q. B. 332 (1851); *Bartonshiel Coal Co. v. Reid*, 3 Macq. [H. of L.] 277 (1856).

<sup>5</sup> Cf. esp. *Chicago R. R. v. Rose*, 112 U. S. 382 (1884).

<sup>6</sup> Cf. *State v. Nain*, 2 Dev. Law. 263, where it is said that the law denied any civil remedy to slaves out of humane regard to the best interests of the slaves.



compensation. A mere duty to look out for one's self or another cannot and should not always be turned into a contract to do so.<sup>1</sup>

There are really three distinct branches of the defence of Employee's Risk which have never been clearly separated by the courts, and the three lines of cases have been treated as if they all came under the principle of implied contract: (1) Cases where the plaintiff is injured by a machine or condition purely incident to the work when he enters upon it; (2) cases where the danger or defect is not incident but actually known by the plaintiff at the time of entry; (3) cases where the machine or condition becomes dangerous or defective subsequent to his entry, but where he continues to work with knowledge.

The first line of cases is the only one to which strictly Judge Shaw's doctrine is applicable. The other two lines come under a far more general doctrine and should never have been decided under a rule peculiar to the relation of master and servant.

As to the first branch, in order that an employer may maintain the defence of implied assumption of the risk, it is laid down by the courts that (1) the risk must be incident to the employment.<sup>2</sup> (2) It is not enough that the peril be incident, unless it so obviously incident that the plaintiff knows it, or from its character and circumstances will be presumed or ought to know it.<sup>3</sup> (3) Plaintiff must not only know but also appreciate the extent of the risk and danger; (4) the question of the plaintiff's negligence is not at

<sup>1</sup> *Riley v. Baxendale*, 6 H. & N. 445 (1861). Wilde, J.: "It does not follow that wherever a duty is cast upon a person, the law will imply a contract on his part to perform it."

<sup>2</sup> *Structure near R. R. track one of the dangers of the business*, *Lovejoy v. B. & L. R. R.*, 125 Mass. 82 (1878); *Fisk v. Fitchburg R. R.*, 158 Mass. 239 (1893). Broken cars, *Yeaton v. B. & L. R. R.*, 135 Mass. 418 (1883). Location of tracks and switches, *Wood v. Locke*, 147 Mass. 605 (1888); *Coombs v. Fitchburg R. R.*, 156 Mass. 200 (1892); *Tuttle v. Milwaukee R. R.*, 122 U. S. 194 (1886). Slipperiness of floor, *Murphy v. American Rubber Co.*, 159 Mass. 267 (1893); *Wilson v. Tremont Mills*, 159 Mass. 155; *Kleinst v. Kunhardt*, 160 Mass. 231 (1893). Darkness of passage-way, *Murphy v. Greely*, 146 Mass. 200 (1888). Dangers on shipboard, *Williams v. Churchill*, 137 Mass. 294 (1884); *Anderson v. Clark*, 155 Mass. 370 (1892).

<sup>3</sup> *Goldthwaite v. Haverhill R'y Co.*, 160 Mass. 555 (1893); *Connors v. Morton*, id. 335; *Scanlon v. B. & A. R. R.*, 147 Mass. 487 (1888): "The risk of safety of machinery is not assumed by the employee unless he knows of the danger, or unless it is so obvious that he will be presumed to know it," *Myers v. Hudson Iron Co.*, 150 Mass. p. 134 (1889): "or which by exercise of ordinary care he ought to know to be incident to the nature of the business in the place where and the manner in which it is carried on." *Wheeler & Wilson Mfg. Co.*, 135 Mass. 293 (1883). Cf. *O'Maley v. Boston Gas Co.*, 158 Mass. 138, and *Ladd v. New Bedford R. R.*, 113 Mass. 413 (1876).

issue<sup>1</sup> until it is first decided whether he has impliedly assumed the risk. In short, a master owes no duty to take care and is guilty of no negligence towards a servant who either actually or presumptively knows, or ought to know, the danger to which he will be exposed. Such a doctrine, however, is not peculiar to servants. If the plaintiff knows the danger, then the defence is purely *Volenti non fit*. If the danger is so obviously incident that he ought to know, and if he chooses to enter upon the work without ascertaining the extent of the risk,<sup>2</sup> then the defence is the same absence of duty to warn against obvious dangers that exists in the case of any occupier of premises towards one entering upon them.

Now, while a servant is held impliedly to contract to accept risks incident, the courts also hold that he does not thereby necessarily assume the risk of all unsafe and dangerous machinery.<sup>3</sup> A master owes a duty towards his servant to supply reasonably safe machinery, so as not to expose him to unnecessary risks,<sup>4</sup> and a breach of this duty will give rise to an action against him, unless he has some defence in the special case. The defence usually set up is that treated by the courts as the second and third branches of the defence of Employee's Risk. In reality, however, it is not the defence of implied contract, but a more general one. When the danger or defect is not incident, but is contemporaneous with or subsequent to the servant's entry, the courts hold that in order that a plaintiff servant should be barred, (1) the servant must be capable of choosing, and of sufficient capacity to understand the risk.<sup>5</sup> (2) He must know the danger.<sup>6</sup> (3) He must not only know of the defect, but must appreciate the probability and

<sup>1</sup> *Joyce v. Worcester*, 140 Mass. 248 (1885).

<sup>2</sup> Cf. *O'Maley v. Boston Gas Light Co.*, 158 Mass. p. 138 (1893).

<sup>3</sup> *Snow v. Housatonic R. R.*, 8 Allen, 445 (1864).

<sup>4</sup> *Hutchinson v. York, N. & B. Ry.*, 5 Exch. 351 (1856); *Bartonsheil Coal Co. v. McGuire*, 3 Macq. 307 (1856), H. of L. "The law justifies a servant in assuming that proper and sufficient appliances will be furnished him;" . . . "an employee assumes the risk of such dangers as without the fault of the master naturally and ordinarily attend the employment." *Buswell on Law of Personal Injuries*, § 207: *Hough v. R. R.*, 100 U. S. 217 (1879); *Northern Pacific R. R. v. Herbert*, 116 U. S. 647 (1885).

<sup>5</sup> *Coombs v. New Bedford*, 102 Mass. 572; *Pingree v. Leland*, 135 Mass. 401 (1883); *Richstain v. Washington Mills*, 157 Mass. 541 (1892).

<sup>6</sup> *Russell v. Tileston*, 140 Mass. 20 (1885); *Gilbert v. Guild*, 144 Mass. 604 (1887); *Boyle v. N. Y. & N. E. R. R.*, 151 Mass. 103 (1890); *Foley v. Pettie Machine Works*, 151 Mass. 297; *Rood v. Lawrence Mfg. Co.*, 155 Mass. 593 (1892); *McCarthy v. Foster*, 156 Mass. 514 (1892); *Downey v. Sawyer*, 157 Mass. 420 (1892); *Patnode v. Warren Mills*, 157 Mass. 284, giving review of cases; *Washington R. R. Co. v. McDade*, 133 U. S. 570 (1889).

extent of the risk and danger therefrom.<sup>1</sup> (4) The fact that the servant undertakes the work unwillingly, under fear of discharge, or by order of his superior officer, will not prevent the application of the defence.<sup>2</sup> (5) Where a servant employed on certain duties undertakes others outside of his own accord, or by order of his master, with knowledge of the danger, he cannot recover, provided he is not misled into a failure to appreciate the extent of the risk by his master's order.<sup>3</sup>

The requisites, as thus laid down, will be seen to be exactly the same as the defence of *Volenti*, as finally formulated in the English cases.<sup>4</sup>

In most of the States outside of Massachusetts much confusion has arisen<sup>5</sup> because of the indiscriminate use of the term "contributory negligence" in these branches of cases. The courts seem to hold that the test of whether the servant assumed the risk of a known defect is whether he was contributorily negligent in working at it, — whether he was using due care in so working.

<sup>1</sup> *Lawless v. Conn. River R. R.*, 136 Mass. 3 (1883); *Taylor v. Carew Mfg. Co.*, 140 Mass. 151 (1885); *Ferren v. C. C. R. R.*, 143 Mass. 197 (1887); *Keenan v. Edison Electric Co.*, 159 Mass. 382 (1893); *Daigle v. Lawrence Mfg. Co.*, 159 Mass. 379.

<sup>2</sup> *Haley v. Case*, 142 Mass. 322 (1886); *Lynch v. Sagamore Mfg. Co.*, 143 Mass. 210 (1887); *Leary v. B. & M. R. R.*, 139 Mass. 584 (1885); *Westcott v. N. Y. & N. E. R. R.*, 153 Mass. 461 (1891); *R. R. Co. v. Fort*, 17 Wall. 557 (1873). Note that a promise by the master to repair the defect in machinery upon which plaintiff continues to work with knowledge may, if the plaintiff relies upon, be taken into consideration by the jury in determining whether the risk is assumed. *Counsel v. Hall*, 148 Mass. 470 (1880). Cf. *Lewis v. N. Y. & N. E. R. R.*, 153 Mass. 76 (1891); and *Clark v. Holmes*, 7 H. & N. 937 (1862); *Buswell on Personal Injuries*, § 212, and note in *HARVARD LAW REVIEW*, V. 37. The true reason would seem to be that the master is debarred from setting up the defence because his own action has led to the alleged assumption by the servant.

<sup>3</sup> *Mellor v. Merchants Mfg. Co.*, 150 Mass. 362; *Buswell on Personal Injuries*, § 210.

<sup>4</sup> It would thus seem that the Massachusetts case of *O'Maley v. Boston Gaslight Co.*, 158 Mass. 135 (1893), which held (seemingly *contra* to English cases), that the Employee's Liability Act did *not* do away with the defence of employee's risk, is of little practical effect.

<sup>5</sup> Cf. *Buswell on Personal Injuries*, §§ 207, 208, 230; *Sherman and Redfield on negligence*, § 208; *Hough v. R. R.*, 100 U. S. 217 (1878); *Kane v. Northern Central R. R.*, 128 U. S. 94 (1888); all taking the view that these cases are merely examples of contributory negligence. The Massachusetts cases have occasionally wobbled, and treated the cases purely from the point of due care in the plaintiff. See *Probert v. Phipps*, 149 Mass. 261 (1889); *Lothrop v. Fitchburg R. R.*, 150 Mass. 429 (1890); *Westcott v. N. Y. & N. E. R. R.*, 153 Mass. 461 (1891); *Rood v. Lawrence Mfg. Co.*, 155 Mass. 293 (1892); *Henry v. King Philip Mills*, 155 Mass. 363. But for explanation of the true importance of the distinction between the two defences, see *Taylor v. Carew Mfg. Co.*, 143 Mass. 472; 140 Mass. 101; *Lawless v. Conn. River R. R.*, 136 Mass. 3 (1883); *Huddleson v. Machine Shop*, 106 Mass. 286 (1871); *Hall v. Chenery*, 159 Mass. 270 (1893).



The confusion arises largely (as pointed out *supra*) because of the anomalous doctrine laid down in Massachusetts and other States as to contributory negligence, and the consequent confusion between that defence and *Volenti non fit*. But, as shown before, it is evident that it is only after reviewing all the facts and deciding that the plaintiff cannot be fairly said to have assumed the risks, knowing and appreciating the danger, that a jury is warranted in inquiring whether he was in exercise of due care in working or in his work. For it may be perfectly consistent with the existence of due care to work on a dangerous machine, and the most prudent men constantly do so; and yet a man so doing may well be debarred from an action, if injured, on the ground of assumption.

To sum up: The duty which a master owes to his servant with regard to the care of his premises, or the machinery upon them, is practically identical with the duty which he owes to other persons who have gone upon his premises by invitation or for business.<sup>1</sup> "It is the duty of all occupiers of real property to which others have right to resort upon business with the occupier, to use due care that those so resorting are not exposed to hidden dangers of which he is, or ought to be, aware, and of which they are ignorant, provided he has no good reason to presume that they have equal knowledge on the subject with himself." To this, in the case of servants, may be added the presumption that the servant knows the ordinary incidents of the business on which he engages when he enters the property of the master. As a foundation for showing no duty on his part, then, the master, like any occupier of premises, has only to show knowledge express or implied on the part of the servant. The defence *Volenti* then may arise.

#### LIMITS OF THE DOCTRINE.

It is evident that there must be some limit in actions of negligence to the defence. It cannot be that wherever a plaintiff knows there is *some* risk he debars himself from any right to complain if injury happens to him.<sup>2</sup> A person does not necessarily assume the risk of the defendant's *negligent* action, even if he knows of it. Thus, if A. knows that B. drives his cab carelessly, and that he has run down many persons, A. does not necessarily

<sup>1</sup> Cf. Bigelow on Torts, p. 328; Story on Agency, 9th ed., § 453 d, note 1.

<sup>2</sup> As Lord Halsbury, in *Smith v. Baker*, says, p. 337: "If this were so, 'no person ought to have been awarded damages for being run down in London streets. . . . No person could have crossed London streets without knowing there was a risk of being run over.'"

voluntarily assume the risk of being knocked down, by simply crossing a street in which he knows B. to be driving. It is submitted that the application of the maxim or defence must be limited to those cases where the plaintiff and defendant enter into some distinct relation towards each other, such as employer and employee, occupier of land and person entering upon the land, contractor and contractee, railroad and passenger, seller of article and person purchasing or likely to purchase or use. But where plaintiff and defendant are simply the members of the same general community, occupying no specific relation to each other, then each is bound to use ordinary care towards the other, and the fact that the plaintiff knows that the defendant negligently does something which may bring him injury, is not conclusive that the plaintiff has assumed the risk of the danger from that negligence. In other words, it is only when a plaintiff has a choice whether he will enter into a specific relation to the defendant that the maxim will apply, if he chooses to enter or continues in that relation with knowledge of the danger. Where the relation between plaintiff and defendant is forced upon the plaintiff by the defendant's action, then if the plaintiff is hurt, even with knowledge of the danger, it does not lie in the defendant's mouth to say, "Yes, but you assumed the risk of my misconduct." The plaintiff may well say, "It was not my choice. The danger and risk of making the choice was forced upon me by your action."

This, it is submitted, is the true explanation of cases like *Thrusel v. Handyside*.<sup>1</sup> In that case, there being no connection between the plaintiff and defendant except that the plaintiff happened to be working underneath the defendant's servants, the fact that the plaintiff knew his position to be dangerous did not absolve the defendant from using due care to prevent injury, because neither party of his own choice had entered into any relation with the other, except that they happened to be working near each other. One party cannot force himself into such a relation with the other so as to allow him to say to the other, who is thus obliged to accept the relation, "If you stay in this position with knowledge, I owe you no duty." Both have equal rights to be where they are, and between them the defence of *Volenti non fit injuria* has no place.

Charles Warren.

<sup>1</sup> *Thrusel v. Handyside*, 20 Q. B. D. 359 (1888). See note in *Law Quarterly Review*, IV. 239, and, for an example of this class of cases, cf. *Mahoney v. Met. R. R.*, 104 Mass. 73 (1870), and cf. an erroneous failure to distinguish it from cases of direct assumption of risk, in *Dewire v. Bailey*, 131 Mass. 171 (1881).

## THE SURPLUS INCOME OF A LUNATIC.

A PART of the ancient jurisdiction of the Chancellor concerns the care of the persons and estates of persons of unsound mind.<sup>1</sup> In the course of the exercise of this parental

<sup>1</sup> Whether it existed at common law or no is perhaps a purely academic question. It appears to have been first definitely formulated in the Statute of Prerogatives, 17 E. II. chs. ix. and x. Chapter ix. of that statute gave the king the beneficial interest in the land of idiots, limited only by the duty of finding them "their necessaries." For a collection of the authorities on this point, see Pope's Law of Lunacy, p. 20, note (8); also Collinson on Lunacy, vol. i. p. 94. Chapter x. is more important, as containing a suggestion of the lines upon which the law in relation to both classes—lunatics and idiots—was at a later period laid down by the Lord Chancellors. It has been suggested to us that lunacy jurisdiction being prerogative rather than equitable, may not exist except by statute in some of the States; and that, the statute not conferring the special jurisdiction to be discussed in this article, difficulty might therefore be found in its exercise. In Kentucky (*Nailor v. Nailor*, 4 Dana, 339); Maryland (*Corrie's case*, 2 Bland Ch. 467); North Carolina (*Latham v. Wiswell*, 2 Ired. Eq. 294); Illinois (*Dodge v. Cole*, 97 Ill. 333); and Indiana (*McCord v. Ochiltree*, 8 Blackf. 15), it has been held that full lunacy jurisdiction exists in American Chancery Courts. Cf. in New York *Brashen v. Van Cortlandt*, 2 Johns. Ch. 264, 402; *contra*, *Oakley v. Long*, 10 Humph. (Tenn.) 254. Where all jurisdictions are merged one would imagine that this jurisdiction could be taken without difficulty, on the ground stated in the cases above. In Massachusetts, where the lunacy jurisdiction is in the Probate Courts (P. S. ch. 139, especially §§ 29-34), the statute which would regulate this matter (§§ 30 ff.) is a mere paraphrase of the 17 Edw. II. ch. x., (1 Pick. Statutes, 381), which gives the king this jurisdiction; and although arguments against such jurisdiction might be drawn from subsequent provisions of the Massachusetts Statute, §§ 33, 34, they would not be in the least as strong as the provision of 17 Edw. II. ch. x., that "the Residue beside their Sustentation shall be kept to their use," which is omitted in Massachusetts. In this connection the forcible remarks of Holmes, J., in *Minot v. Baker*, 147 Mass. 348, where a similar objection was raised, are in point. "The objections . . . to the jurisdiction are purely historical . . . that although in England there was a remedy existing alongside of the ordinary jurisdiction of the Chancellor, and practically reaching similar results, yet since this court has not the powers exercised by the sign manual, a will must be defeated and a trust must fail. . . . If it is possible to avoid such a result it is desirable to do so." So in lunacy jurisdiction, it is desirable, if possible, to avoid a result which will leave the strongest moral duties unperformed.

Fitzherbert's definition of the term "idiot," or "idiota," as paraphrased by Stauneforde [Pr. Reg. 34], is quaint enough to be worth inserting here: "And the maner of the tryall of hym to bee a foole naturall appeares in the sayd *Natura Breuium*, fol. 233; that is to say, yf hee cannot tell to twenty pence, or tell his age, or who was his father and mother, or such lyke thinges whereby it may appeare that he hath no kynd of understandinge in that that is eyther for his profite or dammage. But if hee bee learned and apt to learne then is hee no ideot, as Maister Fitzherbert there thinkes, and *Grene* sayeth in *Saver de Default*, that if hee bee able to beegette eyther sonne or daughter hee is no foole naturall." *Grene*, later C. J. of K. B., is the "Seigneur *Grene*, le Sage Justice" cited with respect by Thirning, C. J. (*Bellewe*, 142).



authority an interesting question has occasionally arisen which it is the purpose of this article to discuss, namely, what disposition is to be made of the surplus income of the lunatic remaining after every reasonable and proper expenditure has been made for his care and comfort?

There are only a few reported cases in English jurisdictions, and scarcely any in the United States, defining the circumstances under which the guardian of a lunatic may spend a portion of his ward's income for objects not directly connected with the ward's maintenance. These cases announce with more or less clearness a tolerably definite principle, though in a few the principle seems to have been wrongly applied. In emphasizing one proposition all the authorities are agreed. That proposition is, that before any portion of his income can be devoted to other purposes, the ward himself must be provided with every comfort that he requires or to which he has been accustomed. There must be no economizing for the purpose of making an allowance to needy relatives, or in order to save something for the next of kin.<sup>1</sup> But when the ward has been liberally provided for, if there is still a surplus of income, allowances may, under certain circumstances, be made to the lunatic's relatives and to certain other persons.

## I.

The only principle that can produce coherency or consistency in making such allowances is the principle laid down by Lord Eldon, in *Ex parte Whitbread*, 2 Mer. 99. Although it has not always been squarely followed by the courts, that principle, it is submitted, is this. Where there is no evidence of any settled intention of the lunatic before his insanity in regard to the matter, or of any intention formed during his rational moments, the court will presume that were the lunatic sane he would act in the matter as any reasonable and ordinarily generous man would act under the same circumstances. In none of the cases, not even in those where the court professes to make "what the lunatic himself would do if he were sane," the *ratio decidendi*, is any account taken of the idiosyncrasies of the lunatic, that is to say

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<sup>1</sup> See remarks of Lord Eldon in *Oxenden v. Lord Compton*, 2 Ves. p. 69, 1793, and in *Ex parte Whitbread*, 2 Merivale, 99, 1816, and of Ames, J., *May v. May*, 109 Mass. at page 256, 1872.

whether he was extravagant or careful, liberal or mean. Unless it can be shown that there is some special reason why the lunatic would not, if he were sane, assist the particular applicants in question, the court will dispose of his surplus property in accordance with the views of a reasonable and ordinarily liberal man, though such views would never be entertained by the lunatic if he were sane. The courts will not hear evidence on the question how a miser or a spendthrift, if he were sane, would dispose of his surplus income.

We proceed to trace the applications of the principle indicated above in the reported cases. The earliest adjudication on the subject appears to be an order of Lord Thurlow's in *Re Cotton*. There is no complete report of the case. The only information to be had about it is contained in a reporter's note to *Ex parte Whitbread*, where the order is merely said to have overruled an objection to a Master's report allowing maintenance from the lunatic's income to his relations generally, "without specifying the proportions which were meant to be granted to the relations respectively." The Chancellor's reasons are not stated. And all trace of this case seems to have been lost; for in 1 Collinson on Lunacy, 246, in 1812, it is said: "When any of the relations of a non-compos are dependent on him, whom he is bound to provide for according to the claims of nature, though not in law, and for whom he provided when of sound mind, the Chancellor cannot direct a specific allowance for their support, but their expenses will be included in the general charges of the establishment, and the maintenance of the non-compos regulated accordingly."

The next case, which is the leading English case on the subject, is *Ex parte Whitbread*, in the Matter of Hinde, 2 Mer. 99, 1816. The case came before Lord Eldon, on objections to a Master's report, the grievance being the smallness of the proportion of the lunatic's surplus income allowed to the petitioner, a niece of the lunatic. The facts are very obscurely stated. No order was made on the petition, but the Chancellor discussed somewhat at length the principle on which such allowances are made. His language at first seems to make the test question, What would *this* lunatic do if he were sane? . . . "The court," says he, (p. 100), "looking at what it is likely the lunatic himself would do, if he were in a capacity to act, will make some provision out of the estate for those persons" [the relatives]. But the next sentence of the opinion shows that the test that Lord Eldon intended to lay down

is not what the particular lunatic with whose estate he is dealing would have done if he had been sane, but what any reasonable man of the same condition in life with the lunatic would do under the circumstances. He says, "So where a large property devolves upon an elder son who is a lunatic, as heir-at-law, and his brothers and sisters are slenderly or not at all provided for, the court will make an allowance to the latter for the sake of the former; upon the principle that it would naturally be more agreeable to the lunatic, and more to his advantage, that they should receive an education and maintenance suitable to his condition, than that they should be sent into the world to disgrace him as beggars." Thus it is what would "naturally" be more agreeable to the lunatic, that the court considers; that is, what would be agreeable to the normal man, with average notions of obligations to relatives and to society, and not what would be agreeable to a man who is what this lunatic was before his insanity.<sup>1</sup>

Such then is Lord Eldon's rule. In the later English cases the expressions used by him are retained. But in almost all the cases it is clear that the sole test and sole limitation is that of the normal sane person in like circumstances. As the cases are very few and indicate interestingly the development of the principle, we proceed to consider them at some length. The order is chronological.

Two interesting classes of cases are omitted as not directly in point.

(A.) Those cases where the expenditure purports to have been upon the lunatic himself. It is obvious that a court can go far in allowing an infant or a lunatic to maintain a large establishment for the sake of the support of a family of brothers and sisters, upon the ground that such is really the best way to spend the ward's money upon himself. For instance, in *Wellesley v. Duke of Beaufort*, 2 Russ. 1, 1827, at p. 28, Lord Eldon says: "In many great families the eldest infant is in possession of a large property; the younger infants have some little property; and in such a case the court does not measure the duty of maintaining the eldest child

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<sup>1</sup> Indeed, the latter test would fail utterly in many cases where the facts were scanty. For instance, the lunacy might have been congenital, and a court could scarcely go into the question of heredity. And so also where the insanity was gradual, it would be difficult and dangerous to endeavor to distinguish sane characteristics from generosity or meanness which were really symptoms of the approaching disease. This danger especially furnishes a strong argument for the more general test laid down by Lord Eldon.



by looking at him only. And it considers that it is for his interest that his brothers and sisters should be brought up in respectable stations; " and he goes on: " We will go the length of giving them maintenance out of his provision as a part of the maintenance made for him, though to be applied to them."

And so in *Re Weld*, 20 Ch. D. at 457, (C. A.) 1882, Jessel, M. R., speaking of "an allowance without account made by the court to a person in a fiduciary position," says: "The purpose for which the allowance is made is defined, and there are no doubt many cases, especially in the Chancery Division [as opposed to Lunacy], where such an allowance is purposely made larger than is wanted for the purpose named, with the object of indirectly benefiting the person to whom the allowance is made, the court having no jurisdiction to benefit that person directly. A very common instance is the case of a man of large fortune leaving an infant eldest son, who takes the great bulk of his property, but leaving an insufficient provision for his widow and younger children. . . . When such an allowance is made of course no account is asked for, so long as the establishment is kept up and the children are properly maintained." And a little farther on he speaks of seeing that "the school bills of the children" are paid, showing that the court acts on the assumption that its allowance is *not* to the ward.

To this class also belong cases where the legal duty of the ward, *e. g.* to support his wife and family,<sup>1</sup> is liberally performed by the court for him.<sup>2</sup>

It is evident that this class of cases sometimes, as in *Re Weld* itself, presents the singular and unpleasant spectacle of a court attempting to cheat itself, and to do indirectly without limit, what

<sup>1</sup> The Statute of Prerogatives, upon which jurisdiction in Lunacy substantially depends, requires the expenditure of the lunatic's income not only upon his maintenance but upon that of his *family*. For a definition of family, as used in statutes, see the remarks of Kenyon, C. J., in *Rex v. Darlington*, 7 T. R. 797 (1792); *Woodworth v. Comstock*, 10 Allen, 425 (1865), authorities in 7 Am. & Eng. Enc. of Law, 803, and the law dictionaries, such as Bouvier. The interpretation of the word in *wills* is to be distinguished.

<sup>2</sup> This class comprises the following cases among others (the list is not intended to be exhaustive): *Bird v. Lefevre*, 4 Bro. C. C. 100 (1792) (Income of paralytic imbecile paid to wife for maintenance of family); *Conduit v. Soane*, *Re Gandy*, 5 Myl. & C. 111 (1840); *Nettleship v. Nettleship*, 10 Sim. 236 (1839) (Husband and wife, maintenance); *Edwards v. Abrey*, 2 Ph. 37 (1846) (Husband and wife). s. c. 15 L. J. N. s. Ch. 404, and 10 Jur. 650 (the reports differ materially). *Re Senate Resolution*, 21 Pac. Rep. 485 (Colo. Allowance to wife). *Re Leach*, 12 So. 126 (La.); *Hallett v. Hallett*, 34 N. E. 740 (Ind.).

it is the purpose of this article to show may be done directly within certain safe limits. One would think that a court would not rest easy in granting an allowance for the use of A, which it may do, to be spent for the use of B, which it says is wrong; and yet it winks at B's profit, and (20 Ch. D. at 457-58) takes away the allowance when B's bills are not paid.

(B.) Those cases where the court carries out for the lunatic definite enterprises begun or planned before his incapacity. Here also the considerations which furnish the *ratio decidendi* for the principal class of cases under discussion often effect and increase the liberality with which the court carries out the ward's wishes.<sup>1</sup>

"We often," said Cotton, L. J., in *Re Whitaker*, L. R. 42 Ch. D. at 126, "give out of the personal estate of a lunatic that which is mere bounty. That generally occurs in the case of charities where the lunatic has himself, while he was of sound mind, supported institutions of a charitable nature."

## II.

The first reported case after *Ex parte Whitbread* is —  
1828. *Ex parte Haycock*, 5 Russ. 154.

This was a petition presented by the committee praying a reference to the Master, to approve of a proper allowance for four illegitimate children of the lunatic and for their mother.<sup>2</sup> The Lord

<sup>1</sup> This class comprises the following cases among others: *Re Frost*, L. R. 5 Ch. App. 699 (1870), *Re Jodrell*, Shelford on Lunacy, 161 (1828); *Re Mackenzie*, 43 L. T. 681 (1880); *Hambleton's Appeal*, 102 Pa. State, 50 (1883). In this case an old man without children, having a large estate, took his nephew and the nephew's family to live with him, paying all the expenses of the establishment and a salary to the nephew. Gordon, C. J., for the court, said that there was every reason for continuing the arrangement the lunatic had made when sane. *Halsey's Appeal*, 13 Atl. R. 934 (1888). Here the inquisition of lunacy found A, B, C and D to be the wife and three children of the lunatic, and the lunatic's property was applied for their benefit accordingly. The real and prior wife and a son by her turned up and made claim. Gordon, C. J., citing *Hambleton's Appeal*, said that the court would at any rate have ordered "the committee to provide for the lunatic and the family which he then (*i. e.* at the time of inquisition found) had about him." *Re Strickland*, L. R. 6 Ch. App. 226 (1871); *Re Heney*, 2 Barb. Ch. 326 (1847). So *Re Whitaker*, *supra*, may by some be considered to belong here.

<sup>2</sup> In argument two unreported cases were cited, *Ex parte Galpin*, "in which a gross sum had been allowed for the benefit of illegitimate children" (out of income?); and *Ex parte Spurrell*, in which a yearly sum had been appropriated for their maintenance.

Chancellor Lyndhurst made the reference prayed, for the allowance to the children, but "declined to extend the order to their mother."

1830. *Re Freak*. Shelford on Lunacy, 160.

In this case the income of the lunatic was divided,  $\frac{1}{2}$  going to four married children and the children of a deceased child. The report states merely the facts, but the context in Shelford indicates that the practice had become well established at this date.

1831. *Re Windsor*. Shelford on Lunacy, 159.

Here the lunatic, with a surplus income of £800, was tenant for life, remainder to petitioner—a child of eight—who was being supported out of his mother's income of £40. It appearing that "the lunatic was every other day capable of expressing his wishes as to the application of his property, Lord Chancellor Brougham, although he recognized the doctrine of Lord Eldon, . . . refused to make the order prayed."

Clearly it is no part of the law to do for the lunatic what he can do for himself, as this man could.

1836. *Re Drummond*, 1 My. & Cr. 627.

Here out of a total income of £5500, and a surplus income of £5000, £2000 had been appropriated to the support of the petitioners—two daughters of the lunatic—and for the keeping up of his house and establishment for them. One of the daughters being about to marry, the Master certified that a proper rearrangement of the income would be made by allowing £1500 per annum for the unmarried daughter and the establishment, and £1000 down by way of advance, and £1000 per annum to the daughter about to marry. The Lord Chancellor (Cottenham) allowed the report, directing "that the sum allowed for the maintenance [of the daughter about to marry] should be settled to her separate use."

This case and the three cases in the note<sup>1</sup> may perhaps be considered instances of the legal obligation to support the immediate family of the lunatic (cf. Viner's Abr. Tit. Ideot); but it is clear that in supplying an annual income to daughters who marry off, the court goes somewhat beyond that, for they are then no longer part of the lunatic's family. *Rex v. Darlington*, 7 T. R. 797.

1836. In the matter of Blair, 1 Myl. & Cr. 300; s. c. 5 L. J. N. S. Ch. 150.<sup>2</sup>

<sup>1</sup> *Re Baker* (1830); *Re Craven* (1830); *Re Goldsmid* (1835),—three similar unreported cases,—are mentioned in a note to this case.

<sup>2</sup> There is some head-note law in the L. J. report.



Here the lunatic had an income much greater than was necessary to support her comfortably. One of her nephews, an adult, had an income of £300 per annum; the other, a clergyman, had £288 per annum. Yet the Lord Chancellor (Cottenham) allowed each of the nephews £150 a year out of the lunatic's estate. The nephews were next in remainder to the lunatic under a family settlement. The court cited *Ex parte Whitbread*, saying that such cases were to be treated with the greatest caution. Nothing was said about treating the allowances as advances, possibly because the beneficiaries were practically the only persons entitled in remainder.

1838. *Re Creagh*, 1 Dr. & Wals. (Irish Ch.) 323.

In 1793 R. C. was found a lunatic. Out of his income of £2500 he had been cared for, and all incumbrances on his estate paid off. His maintenance had been £400 per annum, and the Master found that he was incapable of receiving additional comfort. After several references to a Master to inquire into the circumstances of the nephews and nieces, next of kin, the question came on before Plunket, L. C., of confirming a report recommending allowances of £100 to each of seven nephews and nieces who were either "possessed of small properties subject to incumbrances, which if called in would swallow up" everything, or were totally without means. The order was made accordingly.

The excellent argument for the petitioner relied upon the test of *Ex parte Whitbread*, *supra*, and apparently the order was confirmed upon that ground, for there is no opinion.

1840. *Re Earl of Carysfort*, Cr. & Ph. 76.

Here the lunatic's income was £10,000, his surplus income £8400. John Wright had lived with the lunatic as personal servant from 1817, when the commission issued, to 1840, when, his "age and infirmities having rendered him incapable of giving that attention to the lunatic which his malady required," the committee proposed a pension of £60. The Master submitted the question to the judgment of the Lord Chancellor (Cottenham). The next of kin consented. The Lord Chancellor thought the proposal "very reasonable," but asked for precedents; none were furnished, but it appearing that the committee "were satisfied that the allowance was one which the lunatic, if he should ever recover, would approve, the Lord Chancellor made the order."

This illustrates the way in which the true principle is confused by the incorrect habit of judging what the special lunatic would

do. Here two hypotheses are possible: (a) That the committee knowing the circumstances report that a reasonable man would pension such a servant. No one would quarrel with such a result, and that seems on the whole to be what was meant. (b) That the committee, knowing that the lunatic when sane was exceptionally generous, think that he would make an allowance here, although the ordinary man would not. That, it is submitted, would be wrong.

Note that the case effectually disposes of any notion that this is a right of relatives, a kind of prior enjoyment of their inheritance, like Henry V.'s experiments with his father's crown, — a corollary, as it were, to their right as next in succession. Here the beneficiary was in no way of kin to the lunatic. For the same reason it was obviously impossible that the allowance should be treated as an advancement.

1842. *Ex parte* Fowler, 6 Jur. 431.

This was a petition of the committee upon the marriage of the only daughter of the lunatic, praying a reference to the Master of the question of an allowance for her outfit and an additional annual allowance. The Lord Chancellor (Lyndhurst) made the order prayed, upon the terms of the daughter settling what might eventually come to her as heir-at-law or next of kin of the lunatic; the Master to approve of a proper settlement. Nothing is said one way or the other about treating the allowance as an advancement. Similar orders had been made, one by Brougham, L. C., the other by Cottenham, L. C., in *Ex parte* Drummond, 1836, both unreported cases cited in the principal case.

1844. *Re* Grove, 13 L. J. N. S. Ch. 262.

This was a petition by the committee, sister and sole next of kin of a lunatic, for the increase of an allowance for the maintenance of the lunatic on the ground that there were illegitimate children of a deceased brother of the lunatic to be supported. "The Lord Chancellor (Lyndhurst) said that although the court would increase the allowance of a lunatic for the purpose of making a better provision for his illegitimate children, yet the circumstance of there being illegitimate children of a brother of the lunatic would not induce the court to increase the allowance."

Clearly it was here intended and understood that the expenditure should not be even indirectly upon the lunatic. Clearly, also, the test is that of the average man, for the Lord Chancellor disregarded a suggestion of the petition "that the lunatic would no doubt have

also contributed toward their support, if she was not incapable of doing so." The proposition of the case is that the court cannot be sure that the average Englishwoman would consider that her brother's bastards had any claim upon her.<sup>1</sup>

1844. *Ex parte* Lenehan and O'Geran. *Re* Hennessy, 1 J. & La T. (Irish Ch.) 29.

A creditor of a brother of the lunatic applied to have the brother's allowance impounded. Sugden, L. C., merely said, "I cannot give it to his creditors: it is given to him in order to enable him to live in a respectable manner."

Whatever ought to be done in ethics, it is clear that the average man would support his brother, and not clear that he would pay his debts. It follows that the creditors should have no standing, however large the allowance, and so are the subsequent cases. *Re* Weld, *infra*.

1845. *Re* Earl of Laneborough, 7 Ir. Eq. R. 606.

Here two children were entitled in remainder to one of the lunatic's estates. Their mother petitioned for an allowance for their maintenance out of a surplus apparently ample. The opinion of Sugden, L. C., is very short and unsatisfactory. It is as follows: "I cannot do this. It is out of all order and without precedent. It is to take one man's money and give it to another." The motion was unopposed, the committee appearing by counsel. It would seem that there must have been some special circumstances unreported, for the decision is certainly inconsistent with *Re* Creagh, *supra*, and with the clear English rule, which shows special favor to those in remainder. *Re* Sparrow, *infra*.

1846. *Re* Thomas, 2 Ph. 169.

This was a petition for a reference of the subject of the purchase of a West India estate worth £2000, for the lunatic's son, out of the *corpus* of the lunatic's not very large estate. Cottenham, L. C., "I never heard of such a thing. . . . If you can find any precedent . . . you may mention it again; but if there is none I shall certainly not make one." It would seem from the report that the *corpus*, having in view the lunatic's condition, could not safely be so diminished.

1847. *Re* Clarke, 2 Ph. 282.

Here the lunatic was tenant for life, remainder to his next

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<sup>1</sup> But compare *Bradshaw v. Bradshaw*, 1 J. & W. 647, 1820. Increase of maintenance of an infant for the benefit of an illegitimate brother, born of the same father and mother, who was unprovided for.



brother. The surplus income was £2300. The lunatic had a father, mother, and sister in comparatively reduced circumstances, and two brothers who "had increasing families with incomes of about £230 each." Lord Lyndhurst had allowed £350 to the father, £350 to the next brother, £100 to the younger brother, and on the death of the father had, it appears somewhat obscurely, ordered the Master to divide the father's share between the brothers. Cottenham confirmed the Master's report with reluctance, disapproving of the extent to which the practice had been carried. A sum of £508 for permanent improvements he disallowed. "If," said he, "the remainder-man had been the son of the lunatic there might have been some ground for it; but I cannot sanction payments . . . which are to benefit his brother."

The case illustrates more than is usual the reluctance with which the court acts. The rule to-day would seem to be more liberal. *Re Sparrow, infra*.

1863. *In re Croft*, 32 L. J. (Ch.) 481.

This was a petition of a gentleman residing out of the jurisdiction of the court, the first cousin and one of the two only next of kin of the lunatic praying for an allowance out of the lunatic's surplus income. The lunatic had £1300 per annum; the petitioner was in great distress.

Knight Bruce, and Turner, L. J., on the authority of the cases in *Meriv. & Myl. & Craig*, granted the petition. Knight Bruce was inclined to decide the case on its own peculiar circumstances, without reference to authority and without making any precedent. £100 per annum was allowed to the petitioner, but the allowance was treated as an advancement.

1878. *Re Bryce*, 4 Victoria (Australian) L. R. Equity, 111.

This case is obscurely reported, neither the lunatic's means nor those of the petitioner, his wife, being stated. There was a fund in court of £2163, not the lunatic's whole property, out of the *corpus* of which the petitioner desired £250 with which to go into the millinery business. Molesworth, J., refused the request, but gave costs out of the fund. The lunatic when sane had allowed his wife £3 per week, and that allowance was continued.

1880. *Re Harris*, 49 L. J. N. S. (Ch.) 327.

This was a petition under the Lunatic Asylum Act, 1853, by the managers of a county lunatic asylum for the payment out of the property of the lunatic in court of arrears of maintenance since 1850. It was opposed. Cotton, L. J., held (1) that this was

simply a debt of the lunatic (*Re Marman's Trusts*, L. R. 8 Ch. D. 256); (2) that the court would therefore not order the payment of more than six years of arrears.

Here *Ex parte* Whitbread and analogous cases were not cited, nor was their principle urged upon the court. Had it been, it is submitted that the result might have been different, if (as does not appear) there had been a surplus of the lunatic's estate. For, it may be argued, the average man would not set up the statute of limitations against such a claim; even if the service had been professedly gratuitous, he would pay something, and that the court should do for him. As a creditor the petitioner has no case. It should not follow, as the court here assume, that he is remediless.

1882. *Re Weld*, 20 Ch. D. 451, C. A.

In this case a heavy allowance was made to the lunatic's brother for the keeping up of Lulworth Castle, the family estate, and for the maintenance of the brother and two sisters. The brother became bankrupt, having attempted to mortgage the arrears of his allowance. Jessel, M. R., said that though rendering no account, the brother received the money in a fiduciary capacity, and it followed that he could not make a valid mortgage, and, as a general rule, ought to be removed if he tried to. A bill for wines,<sup>1</sup> and other bills for supplies furnished to Lulworth Castle, were considered proper payments to be made out of the arrears of allowance. Nothing went to the mortgagee or the trustee in bankruptcy.

This seems to follow *Re Hennessy*, 1 J. & La T., 29, *supra*, p. 481. The nature of the interest which the recipient of such an allowance has, is discussed more at length below.

1882. *Re Sparrow*, L. R. 20 Ch. D. 320 (C. A.).

Here the petitioner, a clergyman aged twenty-eight, with an income of £100, and a curacy worth £120, was nephew and heir-at-law of the lunatic, entitled in remainder to the entailed estates, and one of many next of kin, several of whom opposed and insisted that such allowances were never made except with the consent of all concerned. They also said that if any allowance should be made it must be treated as an advancement, and insurance effected. The surplus income was £2000. Jessel, M. R., said that he could and would make the allowance of £500 prayed for; and, the petitioner consenting, the estate tail was ordered to be barred

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<sup>1</sup> Per Jessel, M. R. "I am not sure that they are rightly called articles of luxury."

so far as to let in a charge of that amount, payable to the lunatic's executors, in lieu of treating the allowance as an advancement.

In 1884 the same case came up again, in *Re Beridge*, 50 L. T. N. s. 653, C. A. (Sparrow, the lunatic, seems to have had his name changed to Beridge in the *interim*). It appeared that the nephew's private income of £220 had increased to £300, and that he had married and had a son, thus practically destroying the chances of the next remainder-man in tail, who had opposed the previous petition, but who now assented. The petitioner prayed an increase of his allowance to £1000. Other next of kin opposed. Baggallay, L. J., said that the question was, "What would be a reasonable allowance to enable the nephew to maintain his position of a clergyman . . . without any cure, . . . a married man with one child, and who possibly may have more children." Cotton, L. J., dissented from any allowance, on the ground principally that so large an allowance charged by way of mortgage would leave the estate unwisely incumbered at the lunatic's death. Lindley, L. J., said that they did not differ in principle, and that to him some addition seemed only reasonable, considering the petitioner's prospects and "the large [family?] living we have heard of," to which, it seems, the clergyman might hope to present himself. The allowance was increased to £700.

Cotton's argument, although cogent, goes rather to show the viciousness of treating the allowance as an advancement, and of making such a beneficiary mortgage his future.

1882. *In re Evans*, L. R. 21 Ch. D. 297 (C. A.).

Here the lunatic had a surplus income of £975 after his maintenance in the asylum was provided for. The petitioner was worthy, being a clergyman eighty-one years of age, with eight dependent children and no means, reduced to indigence through no fault of his own by the Disestablishment of the Irish Church. He was one of eight first cousins and next of kin, another of the eight being heir-at-law. It did not appear that the lunatic had ever heard of him. Jessel, M. R., commented upon that fact, but said that it made no difference. He decided the case upon the absence of any claim, legal or moral, of a mere cousin. "South of the Tweed, that is not, I believe, considered to constitute a strong claim. . . . It has never been said that . . . it is to be presumed that it is a matter of interest to him [the lunatic] what becomes of his first cousins."

The only comment necessary to make upon this decision is, that it probably accurately expresses the extent of the average Eng-



lishman's feeling of obligation to his cousins. In a Scotch clan, as the Master of the Rolls intimates, a different obligation would be felt. Probably in this country, in New England at least, an average man who had an income of £925 (\$4600), which he could not reasonably spend, would arrive at a different result. It may be doubted, therefore, whether an American court would follow *Re Evans*.

1884. *Re Robinson*, 27 Ch. D. 160 (C. A.); s. c. 53 L. J. Ch. 986.

An annual allowance of £60 by way of alimony, was after the lunacy of the husband provided for by an order in lunacy. The wife sold and her assignee mortgaged the allowance. The assignee and mortgagee petitioned for its payment to the latter. Baggallay, L. J., said that he preferred to treat it as an allowance in lunacy, given out of "charity," so to speak, the reason for which did not exist after assignment, and the payment of which, therefore, "ought no longer to be sanctioned." Cotton and Lindley, L.JJ., agreed with Baggallay on this point.

1888. *Re Darling*, L. R. 39 Ch. D. 208, C. A.

Here the gross income was £1647, the surplus income £857, after continuing certain annual allowances made by the lunatic while sane to three of his first ten cousins and next of kin. The Master recommended an increase of these allowances, and also allowances to three other first cousins, all six being in extremely narrow circumstances. Counsel attempted to distinguish the case from *Re Evans*, *supra*, on the ground that here there was no opposition.

Cotton, L. J., distinguished as a separate class "those cases in which an allowance has been made by the court in favor of a person who is the next successor to the lunatic's estate, for it is," he said, "the interest of every possessor of an estate that his successor should be educated and brought up in such a manner as to enable him to fulfil the duties attaching to the ownership of the estate." He added that *Re Evans* rendered it unnecessary to go into the question, and that consent or opposition should have no weight in any case. Fry, L. J., said: "I am by no means satisfied that if the lunatic were of sound mind he would have made any further allowances to these relatives." No allowances were made.

Fry's ambiguous remarks may or may not indicate that he thought any special generosity or penuriousness of the lunatic when sane ought to be taken into account. Cotton's point of

the "interest" which a landed proprietor has in his successor's fitness is apt to indicate the basis of the jurisdiction, for clearly it is not "interest," in any legal sense, in the man who will stand in his shoes, but rather the *custom* of ordinary and reasonable Englishmen to provide for their heirs or successors. Notice how the law hardens. After *Re Evans, supra*, and this case, first cousins have probably no chance in England. On the other hand, nephews have on the authorities a strong case.

These are all the English authorities.

In America the case of *Re Willoughby*, 11 Paige, 257 (1844), is the only one that goes into the matter at all, although cases like Hambleton's Appeal, 102 Pa. St. 50, and Halsey's Appeal, 13 Atl. R. 934 (see p. 477, *supra*), approach the line between Class B. and the principal class of cases. *Re Willoughby*, however, is explicit; and the matter is carefully considered by the distinguished Chancellor.

1884. *In re Willoughby*, a lunatic, 11 Paige, 257.

The case was a petition by the wife of a lunatic for an allowance out of his income to support her daughter by a former marriage. The wife was the lunatic's guardian or "committee."

The Chancellor, Walworth, said: "How far the court ought to go in making provision out of the estate of a lunatic for the maintenance of the relatives of such lunatic who have no legal claims upon him or his estate, has never yet been determined. It has frequently been decided, however, that where the income of the estate is large, so as to be much more than sufficient for the support of the lunatic and of those members of his family for whom he is bound by law to provide, the court may make an allowance out of such income to his near relatives who are in need of assistance. This is done almost as a matter of course in reference to the children of the lunatic or other descendants who are presumptively entitled to his estate in case of his death, and where there is but little or no hope of his recovery. I know such orders have been made by this court within the last fifteen years in three or four different cases, where the estates were large, and the incomes much more than sufficient for the support of the lunatics and of all those who had a legal claim upon such lunatics for support and maintenance. But my present recollection is that in all those cases I required the adult children, who were competent to support themselves, to give a stipulation that the amounts advanced to them respectively should be brought into hotchpot upon the death of the lunatic, if any part

of his personal estate should come to them under the statute of distributions. This principle of considering the allowance as an advance, to be brought into hotchpot in distribution, has not, however, been extended to children of the lunatic who were sickly or decrepit, so as to give them a special claim upon the estate of the lunatic. The court, in such cases, acts for the lunatic, and in reference to his estate, as it supposes the lunatic himself would have acted if he had been of sound mind."

The Chancellor made no allowance, being satisfied that the step-daughter was not deserving, but expressed his entire conviction that the law would warrant one in proper circumstances, and cited *Re Earl of Carysfort* (*supra*, p. 479) with approval.

1891. *Re S. T. H.* Suffolk, Mass. probate files.

In this case, the lunatic being amply provided for, an allowance of \$350 per annum was made to his father. There is difficulty in explaining this upon any other ground than that set forth as the *ratio decidendi* of the cases above. An account of the case is given at length in a note.<sup>1</sup>

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<sup>1</sup> *Petition.* Respectfully represents W. B. D. that he is guardian of S. T. H., an insane person heretofore committed by said court to the McLean Asylum. That said ward has no wife, children, issue, or mother living. That his only heir-at-law apparent or presumptive is his father, L. F. H., of . . . who is aged, and in destitute circumstances, and in feeble health. That the only heirs-at-law apparent or presumptive of said L. are the following: [Two sons beside the lunatic; seven children of a deceased daughter.] That the estate of said ward, so far as can be ascertained, will be more than sufficient for his suitable maintenance during his life, and that it is his desire that some suitable provision may be made for the support of his said father. Wherefore your petitioner prays that he may be authorized to pay to said L. F. H. . . . for his support a sum not exceeding \$350 per year, payable in monthly instalments, until further order of this court, and that the same may be allowed your petitioner as a charge against the estate of his ward in his accounts with said estate. — W. B. D., Guardian.

*Assent* of two other sons and the one of the seven grandchildren who was of age.

*Decree.* — "And it appearing to the court that it is the desire of said ward and for his benefit that said provision be made for the support of his father, it is decreed," &c. [following prayer]. — John W. McKim, March 16, 1891.

A man's father is not a member of *his* family.

By P. S. ch. 84, § 6 (Stat. of 1793, ch. 59), kindred of *paupers*, ascendants or descendants, living in this State, and of sufficient ability, shall be bound to support such paupers. By §§ 7 ff. proceedings in the Superior Court are provided, and that court can assess such weekly sum as it shall deem reasonable and sufficient upon the said kindred. This applies apparently only to persons standing in need of public relief, *Hutchings v. Thompson*, 10 Cush. 239; cf. *Groveland v. Medford*, 1 Allen, 23; and little if any more than a pauper's allowance seems to have been. In *Templeton v. Stratton*, 128 Mass. 137, \$1.50 per week was assessed. The principal case would, therefore, seem to be a precedent of the kind of allowance discussed in this article.

For this case we are indebted to the kindness of Hon. W. B. Durant of the Boston bar. It may be mentioned that the allegation of the ward's desire is not to be understood as indicating any interval of sanity.



There is one recent English case which does not properly belong in the list,<sup>1</sup> and which yet deserves special mention. In *Re Whitaker*, L. R. 42 Ch. D. 119 (C. A. 1889), a sudden attack of *angina pectoris* had cut off a merchant who was in the act of changing his will. As a result Whitaker, already a rich man, got £400,000 which the testator intended for the petitioner. Recognizing some imperfect obligation, he gave the petitioner a voluntary promissory note for £50,000, and had, when he became insane, paid three yearly instalments of £5000 each. The beginning which he had made, and his expressions in semi-lucid intervals, showed that he had had a clear intention to pay the whole sum, and this intention the court carried out, repudiating all the while every suggestion of legal obligation. "It is," said Lindley, L. J., "a debt of honour, not in the sense of a gambling debt, which I consider a debt of dishonour, but a debt of honour which this court ought to recognize." Accordingly the court ordered payment out of the lunatic's *principal*. How far they would go in cases where they had no sane intention to guide them, one cannot of course tell. It would take a strong case; but, given a strong case, there seems to be no good reason against such payments,<sup>2</sup> and the court has crossed the Rubicon, and faced the bugbear of "giving away another man's money," in paying out Whitaker's principal on such a claim as this.

### III.

In the conventional standards of the so-called imperfect obligations, which are the standards that the courts are really applying in these cases, the claims of near kindred undoubtedly stand high. But the normal man certainly does not for this reason limit his benevolence to his relations, and *Ex parte Haycock*, *Re Earl of Carysfort*, and *Re Willoughby*, *supra*, show that the court will impose no such limitation. It would be equally an error, however, to infer that the court in these cases acts like a board of charity, to canvass the merits of any person who thinks that he deserves a

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<sup>1</sup> It should be in class B, *supra*.

<sup>2</sup> Suppose, for example, A has an aged mother, and, expecting to survive her, makes his will, leaving all his property to a clergyman. Suppose the clergyman, who was expected to devote the money to purposes of general benevolence, becomes a lunatic before learning of his legacy. Could not the court keep the mother out of the poor-house? And if the lunatic's other property would keep him from want, would the court shrink at spending the principal of this legacy on the testator's mother if it became advisable to do so?

share of the lunatic's surplus income, and it is obvious that no court could safely extend its jurisdiction so far as to carry the test of the normal man to its logical extreme.<sup>1</sup> The decisions, however, furnish no authoritative rule for drawing the line. On the one hand, it is clear that the class of possible beneficiaries is not limited to relatives of the lunatic; on the other hand, it seems equally certain that the applicant must bring strong proof to move the court. For, as Bowen, L. J., said in *Re Darling, supra*, "jurisdiction to make allowances . . . ought to be exercised with the utmost jealousy." And one may tentatively suggest, as a general rule, that wherever the applicant is a near relative, legitimate or illegitimate, or where he has at some time been in intimate personal relations with the lunatic, the court may, in proper circumstances, make the allowance. In extreme cases the court might go farther, but should tread such paths with caution and jealousy.

The rules for determining what are proper circumstances to entitle an applicant to an allowance are equally vague. Absolute indigence is clearly not essential. On the contrary, an heir-at-law, the next in remainder, or the brother who keeps up a family estate (cf. *Re Weld, supra*) may be kept in luxury. What would be an ample allowance for a day laborer (*Re Croft, supra*) has not been increased because an adequate allowance for a clergyman was larger. (*Re Blair, Re Sparrow, supra*.) In *Re Blair* £150 each was given to two nephews with incomes of £300. In *Re Sparrow* the applicant finally got £700 per annum, bringing his income up to £1000; and the general test seems to be there well laid down by Baggallay, L. J. "What," he asked, "would be a reasonable allowance to enable the nephew to maintain his position?"

Another question which has arisen deserves serious consideration. Under what circumstances is assistance rendered in the exercise of this jurisdiction to be treated as an advancement, and brought into hotchpot if the lunatic (as most lunatics do) dies intestate?

The law of advancements in England is still determined by sec. 5, chap. 10, of 22 & 23 Car. II., the Statute of Distributions, and by the judicial interpretations of that Statute. Sec. 5 reads, . . . "And all the residue by equal portions to and amongst the children of such persons dying intestate . . . other than such child or children [not

<sup>1</sup> For instance, a lunatic may have given annually in charity \$1000, each year to a different charity. The court cannot very well continue that, it would seem.

being the heir-at-law] who shall have any estate by the settlement of the intestate, or shall be advanced by the intestate in his lifetime by portion or portions equal to the share which shall by such distribution be allotted to the other children to whom such distribution is to be made. And in case any child other than the heir-at-law who shall have any estate by settlement from the said intestate or shall be advanced by the said intestate in his lifetime by portion not equal to the share which will be due to the other children by such distribution, . . . then so much . . . to be distributed to such child or children . . . as shall make the estate of all the said children to be equal."

In interpreting this section the English courts have had occasion to lay down certain rules for determining what allowances or gifts made by a parent in his lifetime to his children are to be regarded as advancements. These principles are well stated in *Boyd v. Boyd*, L. R. 4 Eq. Cas. 305 (1867), and *Taylor v. Taylor*, 20 Eq. Cas. 155 (1875). In the first case Page Wood, V. C., said, "In short, whatever sum is paid for a particular purpose which is thought good and right by the father, and which the son himself desires, if it be money which is drawn out in considerable amount, and not a small sum, it must be treated as an advancement." In the later case (*Taylor v. Taylor*) Jessel, M. R., commenting on this exposition of Vice Chancellor Wood, said that by "particular purpose" was meant something given to establish the child in life, like a marriage portion. Accordingly he held that the following payments were advancements, viz., (1) an admission fee to the Inns of Court; (2) the price of a commission and outfit of a child entering the army; (3) cost of a "plant" and machinery to start a son in business. But he held that the payment of an army officer's debts, and an annual allowance to a clergyman for household expenses, were not advancements.<sup>1</sup>

These remarks show clearly enough that stipends for maintenance payable out of income are not advancements, in the absence of evidence of direct intention to make them so; and the general inquiry clearly is, what is it reasonable to infer from the mere fact of a gift of the kind under the given circumstances? It is difficult to understand why the same test should not be applied in dealing

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<sup>1</sup> See also the note to *Pusey v. Desbouvrie*, 3 P. Wms. p. 316; *Swinb. Pt. 3*, § 18, pl. 19; *Bac. Abr. tit. Executors* and authorities in last American ed. of *Williams on Executors*.



with allowances made by the court out of a lunatic's surplus. The court represents the lunatic, and should act as he would under like circumstances. Therefore if the advancement cases show that a sane person would not be reasonably expected to treat an allowance as an advancement, why should the court adopt a different rule in lunacy cases? A practical reason is not far to seek. In fact a lunatic's surplus rolls up for the benefit of his next of kin, and their expectations may be disappointed. But what shred of right or claim, we ask with deference, can they have to demand that the surplus shall roll up? The court watches jealously to see that they do not economize on the lunatic's maintenance,<sup>1</sup> and why should not the rule be the same here? Another reason, which perhaps has had more weight, is that some judges, frightened at what seems to them audacity in exercising this jurisdiction, try, as soon as they have done anything, to neutralize its effect; and so in their decisions the Court of Chancery, instead of acting as the wise guardian, carrying out the lunatic's wishes, seems furtively to make a loan out of funds in court, and make it payable out of the borrower's expectations, — a true post-obit, since the next of kin of to-day may not survive the lunatic.

Take as an example the case of *Re Frost*, L. R. 5 Ch. App. 699 (1870). There the court continued allowances made by the lunatic to needy relatives. The surplus was large, yet the allowances from their size and nature might almost have been made by overseers of the poor. James, L. J., nevertheless, without giving reasons, said that the allowances must be treated as advancements.

Now, no one with so large a surplus income as that of this lunatic would consider such allowances as advancements to be deducted out of the recipients' legacy or distributive share. And so especially where, as here, the allowances had been begun by the lunatic, any reason for treating the payments as advancements seems to be wanting.

In *Re Willoughby*, *supra*, Chancellor Walworth seems to have thought that these allowances would be treated as advancements where possible, except in the case of "children who are sickly or decrepit, so as to give them a special claim on the lunatic for support." With deference it is submitted that this is at least no improvement on the English rule. In any case the recipient

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<sup>1</sup> Pope, Lunacy, p. 147 and note *f*, 2d ed. 1890.

should have what an ordinary person, standing in the same relation to him as the lunatic, would give him; and if a sane man would not treat such assistance as an advancement, it should not be made one by a court. We have, perhaps, dwelt unduly upon this topic of advancements, but thinking it, as we do, the one serious mistake in the exercise of the jurisdiction, we could scarcely do otherwise.

#### IV.

This disposition of the lunatic's income, serving as it does to substitute a wise expenditure for senseless accumulation, and to carry out those imperfect obligations which are none the less real because their sanction rests rather in the customary ethics of the community than in any legal remedy upon them, deserves to be consistently followed out and developed in the future. What its future will be one does not venture to predict; but a few considerations may not come amiss. Where, for instance, in the law are we to classify the interest of the recipient? An income which one draws regularly from a fund in Chancery, and which can only be stopped by an order in court after due proceedings, is practically more than mere charity. But how much more? The recipient in England takes it free from all claim of his creditors, *Re Hennessy*, *supra*, p. 481; yet it can be settled to a wife's separate use. *Re Drummond*, *supra*, p. 478. Even arrears cannot be assigned, *Re Weld*, *supra*, p. 483; Robinson, *supra*, p. 485, or mortgaged; and such action is perhaps a cause for the withdrawal of the allowance.

These characteristics seem to show that it is about as far on one side of a discretionary trust, like that in *Re Coleman*, 39 Ch. D. 158 (1888), as *Broadway Bank v. Adams*, 133 Mass. 170 (1882) is on the other. Yet in the fact that it puts money, sometimes large sums in regular instalments, into the absolute control of a man whose creditors may, for all the difference it would make, be starving, it more closely approaches *Bank v. Adams*. How far, one may ask, would the theory of *Bank v. Adams* be carried out? For instance, might not some American court which acted in its other decisions upon the principle that an estate to live on is an estate to pay one's debts with, make the aid conditional upon the annual payment by the recipient of some part of his honest debts?—saying, "The normal man might do this; assuming that he would, we refuse to lend our aid to such proceedings." Just as a court cannot, in the nature of the case, be as generous as the normal

man would be, so it might be able, on the other hand, to improve on his morals. Yet, so far it has not attempted to do so.

Not the least interesting thing in this whole bit of law is the glimpse which it gives us of our friend, the Average, Reasonable, Prudent Man. In negligence cases his prudence has been a reproach to us all. We know that his investments as a trustee have been wise beyond reproach. We have seen with wonder that "his conduct under given circumstances is . . . always the same."<sup>1</sup> But here he is spending his income, and here, therefore, for once we feel that he stands before us as a brother. There is something refreshing in the way in which we hear of his opinion of first cousins. "South of the Tweed," says Sir George Jessel, it is not to be "presumed that it is a matter of interest to him what becomes of his first cousins." They may go to the poor-house.<sup>2</sup>

*William G. Thompson.*

*Richard W. Hale.*

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<sup>1</sup> Holmes, Com. Law, III.

<sup>2</sup> Compare Code Nap. § 510. Les revenus d'un interdit doivent être essentiellement employés à adoucir son sort, et à accélérer sa guérison. § 511. Lorsqu'il sera question du mariage de l'enfant d'un interdit, la dot ou l'avancement d'hoirie (advancement of heir's portion) et les autres conventions matrimoniales seront réglés par un avis du conseil de famille, homologué par le tribunal, sur les conclusions du procureur du Roi. See Tripier's edition of the Codes.



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HAS A CRIMINAL JURY A RIGHT TO JUDGE THE LAW?—In the case of *Sharf and another v. The United States*, decided January 21 last, 15 Sup. Ct. Rep. 273, the Supreme Court of the United States has considered with the greatest care and elaboration the question of the right of the jury to judge of the law in criminal cases. The court holds (7 to 2) against it. It is easy to see that the opinion of the court (by Harlan, J.) and the dissenting opinion of Gray, J., with whom Shiras, J., concurs, are to be henceforth the great references upon this much debated subject. Mr. Justice Gray, who was the reporter of the great case of *Comm. v. Anthes*, in 5 Gray, 185, and the author of a remarkable and learned note on this question in *Erving v. Craddock*, Quincy, 553, has now put forth all his learning and strength in vindication of his well-known views. If it be thought, as it would seem that it well may be, that he does not satisfactorily establish them, it may well be concluded that it is because it is impossible to establish them.

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A "CONSTRUCTIVE" FLIGHT FROM JUSTICE. — Two persons stood in North Carolina and shot across the border at a man in Tennessee and killed him. Upon an indictment in North Carolina for murder, they were discharged, on the ground that their crime was not committed in North Carolina. *State v. Hall*, 114 N. C. 909. Their extradition was then requested by Tennessee, but the Supreme Court of North Carolina held that they were not "fugitives" from Tennessee, and that there was therefore no provision of law for their extradition. *State v. Hall*, 20 S. E. 729. Both decisions are supported by abundant authority.

Two judges, however, dissent from the decision in the second case, upon two grounds: first, that the defendants were "constructively" in Tennessee, if it was true that their crime was committed there, and as a consequence that they had "constructively" fled into North Carolina,

where, in any but a Pickwickian sense, they had continually been; secondly, because to allow such miscreants to escape just punishment for their misdeeds would be "a singular state of things," and would have surprised the judge who first laid down the doctrine as to *locus* of a crime of this sort. That judge was really in error; and his error the court should now "correct, not perpetuate," by surrendering these fugitives for trial in Tennessee.

These two arguments are examples of rather common misconceptions. The first would lead logically to this result, if applied to the sinking of a Chinese war-ship by a Japanese. Either the Japanese were on board the Chinese vessel when they fired the guns which sank the latter, or the damage was done on board the Japanese vessel; a sufficiently absurd dilemma. It is in fact quite possible for a man, even without the help of a human agent, to do something in a place where he is not present.

The argument *ab inconvenienti* indicates a praiseworthy but misplaced zeal that a wrongdoer should receive his just deserts. It is not the duty of a judge to deal out retribution for sin; perhaps that function cannot profitably be separated from omniscience, but at any rate it has never been committed to a court of common law. In punishing crime the court is dealing with an injury to the State whose law it administers. Killing a man in Tennessee is not an injury to North Carolina, and that a man should go unpunished for an offence against Tennessee should not officially concern a North Carolina judge, whether the man is on the east or the west side of the boundary line. In ordering the surrender of a fugitive the North Carolina court is still dealing with North Carolina law (or with an Act of Congress), and the effect of that law on the administration of justice in Tennessee cannot be considered. The legislature, not the court, considers Tennessee in the matter. These two judges could hardly with consistency object if a Tennessee officer should kidnap the defendants and carry them into Tennessee.

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**LIBEL BY EFFIGY.**—The London newspapers last month contained accounts of the case of *Monson v. Madame Tussaud & Sons (Limited)*, a suit for libel which forms the last act in a *cause célèbre*. Mr. John Alfred Monson, as everybody knows, is the gentleman who figured as defendant in the sensational murder trial in Scotland a year ago, the charge being that he killed his pupil, Cecil Hambrough, while the two were on a hunting trip together. It appears that after his escape from that ordeal, with the ungracious verdict of "Not Proven," and after the failure of his suit to recover the insurance on the life of the very man he was charged with having murdered, the defendants, who are the proprietors of Tussaud's well known wax-works show, thought him a suitable subject for a wax figure in their establishment. Monson's own hunting suit and gun were procured to dress up the figure, and the whole was set off by a background representing the Scottish moor where the shooting occurred. According to the defendant's story, Monson sold them the clothes and gun for this very purpose; but however that may be, no sooner was the show well started than Monson brought his action for libel, the innuendo being that the defendants, by the exhibition of the effigy, meant that the plaintiff was a "notorious person connected with a tragedy that remained a mystery in a way that was discreditable." It is not clear why an innuendo that the defendants meant that Monson was a murderer would not have been

proper, nor why to the innuendo actually alleged the defendants could not have pleaded truth.

The case well illustrates the freedom with which English judges express their opinion on the facts at issue. The Lord Chief Justice, in summing up, asked the jury if they could have any doubt that the effigy was a libel, and on the question of damages said, in effect, that Monson was a fraud, a blackguard, and a fabricator, whereupon the jury at once returned a verdict for the plaintiff, damages one farthing. The distinction between a binding instruction and such unequivocal remarks as these seems a little shadowy, even making allowance for the English practice of commenting on the evidence. The Lord Chief Justice prefaced his charge with the observation that there was no class of cases in which the functions of the judge were more limited, and that the jury were the sole judges of whether the particular matter complained of was or was not a libel. They may have been, but they certainly received from the bench a significant hint of what was expected of them. The American practice of omitting all comment on the evidence is assuredly more in keeping with the general rule that questions of fact are for the jury, though doubtless there is much to be said from a utilitarian point of view for the sort of thing illustrated in this case.

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AN AGENT'S AUTHORITY BY NECESSITY. — In the case of *Gwilliam v. Twist*, 11 *The Times* L. R. 208, the Court of Queen's Bench decided that the conductor of an omnibus has authority implied from necessity to appoint, in certain emergencies, a stranger to drive the vehicle back to the yard, and, as a consequence, to render his principal liable for the stranger's negligent conduct on the road. This decision, although apparently arrived at with some hesitation, seems so clearly right as to require no discussion; but the questions which it suggests are by no means so easily disposed of. Suppose it a cab instead of an omnibus, no conductor, and only an intoxicated driver, insensible from drink, — is it possible then to make the principal liable for a stranger's acts? Probably the same result would be arrived at. Story, for example, says (*Agency*, 6th ed., § 142): "In such cases, the stranger performs the functions of the *negotiorum gestor* of the civil law; and seems justified in doing what is indispensable for the preservation of the property, or to prevent its total destruction." Wharton, however, (*Agency*, § 355,) appears to disagree with this conclusion, and, indeed, if it is to be arrived at, it should not be on the analogy suggested. The Roman Law doctrine of *negotiorum gestio* hardly seems susceptible of being stretched beyond its legitimate limits, *i. e.* a quasi-contractual relation between the two parties alone, not extended to include outsiders; and most of the law on the Continent on this subject being statutory would seem equally inapplicable to the case. If Story's result is to be reached on contractual theories of agency, it can only be by an implication of what the principal should have meant had he thought about it, and not by a true inference from any actions or understanding on his part. Perhaps, on some other conception of agency, it may be more easily explained. At any rate, the result will probably be worked out on some such line, while the true basis on which the conclusion will be founded is a sound public policy which makes such a solution desirable.



CANADIAN CONSTITUTIONAL LAW. — A recent case before the judicial committee of the Privy Council, *Brophy v. Attorney General of Manitoba*, 11 *The Times Law Reports*, 198, furnishes some interesting suggestions upon a point which might well have been a burning question of our own constitutional law and history. It is well known that it was seriously proposed and advocated, at one time even agreed upon, in the Convention of 1787, to give to the national legislature power "to negative all State laws contravening," in its opinion, the Federal Constitution. Madison Papers, Elliott's Ed. of 1866, pp. 139, 321. Such a provision is, in substance, to be found in the constitutional statute which defines the powers of the Provincial government of Manitoba, for § 22 of ch. 3 of Canadian Statutes of 1870 provides for an appeal to the Dominion Cabinet from any act of the Legislature "affecting any right or privilege of the Protestant or Roman Catholic minority . . . in relation to education." The decision on appeal to be carried out in the last resort, but "as far only as the circumstances of each case require," by the Dominion Parliament. After prolonged litigation, having for its object a declaration of the unconstitutionality of the Manitoba Education Act of 1890, it was finally declared to be *intra vires*, or, as an American would say, constitutional. *Winnipeg v. Barrett*, L. R. [1892] Cr. C., 445. The dissentients then appealed to the Cabinet, and the question framed to secure the opinion of judges upon the power which the Cabinet had finally reached the Privy Council, whose judgment was delivered by Lord Herschell, L. C., *Brophy v. Attorney General, ut supra*. Two points make it of interest in the United States. In the first place, the question whether the conditions have been fulfilled which authorize an appeal is quietly but clearly treated as a judicial question, not as a political question for the Cabinet to decide for itself, or even where its mere decision in the first instance is of weight. In the second place, the right of appeal covers, as the express decisions show, ground not covered by the power of the courts to declare acts unconstitutional. This, though due to the language of the Manitoba Constitution, might, it would seem, have happened if the provision had been inserted in our own, for the provision proposed was a power "to negative all laws . . . contravening in the opinion of the national legislature," the Federal Constitution. Manitoba has taken the Dominion's negative with bad grace. And with us a negative would probably have created friction and bad blood where the action of the courts is accepted quietly.

MAINTENANCE. — The recent English reports furnish two interesting cases involving the venerable and now somewhat decrepit tort of maintenance. In *Alabaster v. Harness* ('95, 1 Q. B. D. 339), the defendant was shown to have maintained one Tibbits in an action of libel brought against the present plaintiff. The defence set up in the present case was that the libel was directed against and affected the defendant Harness quite as much as Tibbits. The court held that this was not such a "common interest" as came within the exception to the rule against maintenance.

In *Grant v. Thompson* (11 *The Times L. R.* 207) the facts were as follows. Thompson, wishing to injure one Shibley, procured the plaintiff, a solicitor, to prosecute Shibley for larceny. The plaintiff did so unsuccessfully, and now sues the defendant on his promise to guarantee the plaintiff to the extent of £20. It was objected that the contract was tainted

with the illegality of maintenance. But the court gave judgment for the plaintiff, holding that the doctrine of maintenance did not apply to criminal proceedings. "Maintenance consists in interfering with matters in which the person has no concern. It is for the public benefit that any one should be entitled to prosecute."

In both cases the general propositions as to the law of maintenance are undoubtedly correct. In the second case, however, it is worth while noticing that the defendant was not sued in tort for maintenance, but was sued in contract. While the contract was clearly not tainted with maintenance, it does not follow that it was quite unobjectionable on some other ground of public policy. It is one thing to say every man is entitled to prosecute a criminal action, and another to assist him in making a profit by so doing. It is not the policy of the law to stimulate an improper prosecution, nor to assist those who inaugurate such proceedings. The injured party has, to be sure, his action for malicious prosecution. That is probably one reason why the tort of maintenance has never been applied to criminal actions. But the wrong-doer should not be aided by the court to profit by his tort. If it could be shown that the plaintiff in the principal case knowingly undertook a malicious prosecution, that would seem to be a good defence to the action on the contract. The point was not brought out by the pleadings or argued on the appeal, and perhaps was not justified by the facts.

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OFFER AND ACCEPTANCE. — The New York Court of Appeals last December divided almost evenly on a question of some interest to the business community. Two parties had been exchanging letters with a view to an agreement, and finally one made an offer, definite in all its terms, and added, "If satisfactory, answer, and I will forward contract." The reply was, "All right; send contract." When the contract was sent, the other party refused to sign it. A bare majority of the court held that there was a contract. *Sanders v. Pottlitzer Bros. Fruit Co.*, 144 N. Y. 209.

It seems to be well settled, as the cases collected in 40 Cent. L. J. 92 show, that the mere fact that parties wish to have a formal agreement drawn up will not prevent their being bound by a previous agreement, if it is clear that such an agreement has been made. *Bonnerwell v. Jenkins*, 8 Ch. D. 70; *Bell v. Offutt*, 10 Bush, (Ky.) 632; *Blaney v. Hoke*, 14 Oh. St. 292; *Mackey v. Mackey*, 29 Gratt. 158; *Cheney v. Eastern Trans. Line*, 59 Md. 557; *Paige v. Fullerton*, 27 Vt. 485; *Chinnoch v. Marchioness of Ely*, 1 De G. J. & S. 638; *Winn v. Bull*, Ch. D. 29, 32. On the other hand, if the acceptance is made subject to a written agreement, or if the terms of the bargain are not definitely settled, there is no contract, and in all cases the fact that a subsequent agreement is to be drawn up is cogent, although not conclusive, evidence that the parties do not intend to be bound. *Ridgway v. Wharton*, 6 H. L. C. 238; *Winn v. Bull*, 7 Ch. D. 29. But when there is a definite proposal, definitely assented to, and when the acceptance is not expressly made subject to a future agreement, it seems more reasonable to suppose that the parties intend the very terms agreed upon to be put into form, than that they intend them to be subject to a future agreement, the terms of which are not expressed in detail. There is in such a case little more than the mere fact that a future agreement is to be drawn up, and that, as already stated, is not enough. A definite offer, accepted in terms, is in most



cases enough to make a contract, and, according to the opinion of the majority, it makes one in this case. The contract is to sell goods and to sign a written paper as evidence, and because one of the parties refuses to sign the paper, *non sequitur* that the other may not prove the contract by other legal evidence.

The New York Court divided in the same way on the same question in 1860. *Pratt v. The Hudson River R. R.*, 21 N. Y. 305.

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COURT AND JURY. — During the trial of the case of *Cahill v. Chicago, Milwaukee & St. Paul Railway Co.*, in the Circuit Court of the United States at Chicago (Chicago Law Journal, January, 1895, p. 4), the judge directed the jury to find a verdict for the defendant. This one of the jurymen refused to do, and he was, as a consequence, ordered into the custody of the marshal. Before the question of contempt, however, came on for hearing, the verdict was accepted by the plaintiff's attorney subject to exceptions. The point raised during the trial was, nevertheless, of such novelty and importance that it received no little discussion in the current papers. The reason why such questions seldom arise is, probably, because judges ordinarily try to avoid coming into conflict with the jury, and generally, in some tactful manner or other, avoid the dispute. Indeed, such finesse is almost always necessary in handling a somewhat unmanageable body like our jury, which is much easier led than driven. In a very similar case in Vermont, for example, the judge told the jury he would not insist if they thought his action wrong, but that they had better consider the situation carefully before coming to any conclusion. They followed his advice, deliberated, and finally went his way. Here, however, no such conciliatory measures were adopted, and the result was a temporary conflict, in which the rights of the jury were substantially involved. It would seem as if *Bushell's Case* (Vaughan, 135, 142, 147-149), decided in 1670, had settled the law on this subject once for all. Indeed, although that decision might well have been regarded as somewhat weakened because it went on a conception of the jury which no longer prevails (Thayer's *Cas. on Evidence*, 5-19), it has nevertheless been considered undoubted law up to the present time; and wisely so, it would appear. It is only right that the functions of the court, as trier of law, and the jury, as trier of fact, should be carefully distinguished (Thayer's *Cas. on Evidence*, 143-238), and although the jurymen would be undoubtedly justified, legally and morally, in returning a finding of facts which he does not believe in, if so ordered to do, yet it is hard to see what right the judge has to coerce the jury to arrive at his result. An honest man, laboring under a misunderstanding as to the weight and meaning of the words "law and fact" in his oath, might well refuse to tell what he regarded as a gross lie. The advantage of punishing him for so doing is by no means apparent, as such a method is, it would seem, against the usually accepted doctrine, and is at best a useless exercise of authority, when the same result might be as easily accomplished in a more peaceful way.

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MALICE. — A point of considerable interest, though not entirely new, has just been decided by Kekewich, J., in the recent English case of *Trollope & Sons et al. v. London Building Trades Federation* (11 *The*



*Times* L. R. 228). The defendant trades union accused the plaintiffs of discriminating against union men, contrary to an agreement with the defendant made by the plaintiffs and other builders. Accordingly, the defendant published and circulated widely a large yellow poster with a "mourning border," headed "Trollope's Black List," giving the names of non-union men employed at the firm's works, and the names of men who had remained on the works after the commencement of a recent strike ordered by the defendant. Messrs. Trollope and several of their employees named in the "black list," brought suit for malicious interference with their business, and moved for an interlocutory injunction on the ground that the act of the defendants tended to coerce the firm's workmen into leaving, to deter others from entering its employ, and in general to persecute the plaintiffs and bring them into odium and contempt with those who might otherwise deal with them. The injunction was granted, and Mr. Justice Kekewich expressly rested his decision on some remarks of Lord Field in the case of *The Grand Mogul Steamship Co. v. Macgregor* ('92 App. Cas. 51, 52). In that case Lord Field relied on the opinion of Lord Holt in *Keeble v. Heckeringill* (11 East, 574), citing these words: "If the acts complained of, though done in the way and under the guise of competition or other lawful right, are in themselves violent or purely malicious, or have for their ultimate object injury to another from ill-will to him, and not the pursuit of lawful rights," then they are actionable if the plaintiff sustains damage thereby. In the opinion of Kekewich, J., the principal case fell within the lines laid down by Lords Holt and Field. Although the defendants sought remotely some benefit to themselves, their principal motive was to injure the plaintiffs, "and to prevent them from carrying on their ordinary trade or business with the freedom which was the privilege of Englishmen."

The principles of law underlying this decision seem perfectly sound, and the conclusion correct, assuming the circular to have the effect attributed to it by the court. The case belongs to that class of malicious wrongs, not very common, where the damage consists in influencing third persons under no legal duty to the plaintiff. The labor troubles of the past few years have presented us frequently with cases of malicious conduct uncommon in former times, and toward whose legal construction the older books give little help. The result has been a noticeable development of this branch of torts within a very short time. It is now generally accepted that a malicious interference with the plaintiff's vested rights, even if they be of contract only, is actionable. But where the act complained of consists in maliciously influencing persons who have not yet entered into any legal relation with the plaintiff, the law is by no means generally settled yet. Since *Temperton v. Russell* ('93, 1 Q. B. D. 715), there has been a decided tendency toward making it a tort maliciously to induce others not to deal or contract with the plaintiff. There are numerous decisions in this country recognizing such a principle, and the principal case seems to belong to this class. For the defendants to circulate the poster was not unlawful, in one sense of the word. But where their principal object was to injure the plaintiff, and their own welfare was only remotely considered, the element of damage to the plaintiff would seem to outweigh the benefit to the defendants of freedom to protect and further their interests. It may well be that in cases of this sort the defendants' motives might become material. But in the principal case it hardly seems necessary to go beyond external tests of liability.

Quite aside from the defendants' motives, their act probably exceeded the legitimate bounds of competition.

In 8 HARVARD LAW REVIEW 1., Mr. Justice Holmes emphasized the fact that these cases are after all decided on broad grounds of public policy, and that such policy is determined by our economic experience. That is true of most judicial legislation. Our experience with labor organizations is not as yet very extensive, and the results are not likely to be summed up alike by all judges. Since the principal case a similar decision has been rendered by Kennedy, J. *Flood v. Jackson*, Q. B. D., March 5. And an interesting New Jersey case in the Recent Cases, page 510, *infra*, is to the same effect. So that the new cause of action seems to be popular.

COMPARATIVE CITATION OF REPORTS. — The editor of "Legal Bibliography" has compiled some interesting statistics of the frequency with which the judges of a State cite and rely upon foreign reports. His tables show the result of a count made of the citations in the judgments reported in the current volume of each set of State reports, and of the United States Reports, omitting, of course, the citations by each court of its own decisions.

Four jurisdictions are cited beyond comparison more than any others. Two counts, the first taken before the reports of thirteen less important States had been examined, the second the final one, showed the following result: —

	First Count.	Final.
United States . . . . .	1137	1669
English . . . . .	1483	1594
New York . . . . .	1164	1424
Massachusetts . . . . .	1120	1263
Next in rank { Pennsylvania . . . . .	446	
{ California . . . . .		.805

Seven of the States omitted in the first count were recently admitted; the other six were States before 1865 (one was of the original thirteen), but it would seem that the greater part of the additional citations came from the reports of the new States, for the additions make two marked changes; they bring the United States Reports up from a poor third to an easy first, and they bring California up from a tie for ninth place to fifth with a showing sixty per cent better than her next competitor. This seems to point, though not surely, to the establishment of a distinct Western school of jurisprudence, which relies chiefly upon the two sets of reports last named, and it suggests an interesting question whether any tendency to uniformity in State jurisprudence may not be prevented or seriously arrested by the presence of two schools, a Western and an Eastern one.

To present an accurate result from one point of view, the tables should of course have taken into account the small number of citable cases in the reports of the smaller States. If, for instance, instead of sixteen volumes of Rhode Island, there were one hundred and fifty, as there are of Illinois, and the frequency of citation were maintained, Rhode Island would stand ninth, next but one after Illinois, instead of in her present position of thirty-sixth. From the point of view of a purchaser of law books, which is the purpose for which the statistics were compiled, that is just as much her misfortune, although not her fault.



The final result is so interesting that the Review copies it in full.

"Cases of other courts were cited in the decisions contained in the latest volumes of reports from forty-five States (including all the newer States, as well as the older), as follows:—

United States . . . . .	1669	Georgia . . . . .	92
English . . . . .	1594	Tennessee . . . . .	89
New York . . . . .	1424	Kentucky . . . . .	87
Massachusetts . . . . .	1268	Nebraska . . . . .	78
California . . . . .	805	Mississippi . . . . .	70
Pennsylvania . . . . .	532	South Carolina . . . . .	66
Illinois . . . . .	471	Virginia . . . . .	66
Michigan . . . . .	385	Colorado . . . . .	62
Iowa . . . . .	355	Louisiana . . . . .	59
Indiana . . . . .	317	Nevada . . . . .	58
Missouri . . . . .	306	Arkansas . . . . .	53
Wisconsin . . . . .	303	Rhode Island . . . . .	39
Maine . . . . .	230	Oregon . . . . .	39
Minnesota . . . . .	215	West Virginia . . . . .	34
Ohio . . . . .	207	Arizona . . . . .	22
Connecticut . . . . .	206	Montana . . . . .	21
New Hampshire . . . . .	205	Idaho . . . . .	15
New Jersey . . . . .	205	Florida . . . . .	14
Alabama . . . . .	163	South Dakota . . . . .	13
Kansas . . . . .	158	Washington . . . . .	12
Vermont . . . . .	151	North Dakota . . . . .	9
Maryland . . . . .	131	Delaware . . . . .	8
Texas . . . . .	126	Wyoming . . . . .	2" <sup>1</sup>
North Carolina . . . . .	103		

## RECENT CASES.

AGENCY — FRAUDULENT ACT OF BANK OFFICER — PRINCIPAL NOT BOUND BY THE ACT OF KNOWLEDGE OF SUCH OFFICER. — The vice-president of a bank placed notes given by his father payable to the bank among the assets of the bank, to replace some stock belonging to himself which had been objected to by the bank examiner. The stock was afterwards taken back by the vice-president as payment of the notes, and replaced among the assets. All this was done without the knowledge of the other bank officers. *Held*, that the bank was not bound by this payment of the notes, but they were still valid against the father. *Findley v. Cowles*, 61 N. W. Rep. 998 (Iowa).

The case seems perfectly supportable on the ground that the vice-president was not acting within the scope of his authority in receiving stock in payment of notes, or that the father was implicated in the fraud. But there seems to be no occasion for the application of the doctrine that the knowledge of an agent committing a fraud is not imputable to the principal, though the court rely on this very strongly, citing *Innerarity v. Bank*, 139 Mass. 332.

AGENCY — KNOWLEDGE OF BANK CASHIER — EFFECT AS NOTICE. — The cashier of defendant bank mortgaged certain property of his to the plaintiff, it being provided that the mortgagor should have the right to sell, and apply the proceeds in payment of the mortgage. The cashier took the property to market, sold it, and sent the draft he received in payment, to the vice-president of defendant bank, who was acting cashier in his absence, with directions to place it to his credit. The acting cashier applied it in payment of an overdraft on the bank by the regular cashier. *Held*, that the knowledge of the regular cashier as to the nature of the draft was not imputable to the bank, and that it held freed from equities. *Rock Spring National Bank v. Suman*, 38 Pac. Rep. 678 (Wyoming).

The decision, which seems clearly right, goes principally upon the ground that the bank cashier was not the agent of the bank at the time of the transaction. But even if

<sup>1</sup> 1 Leg. Bib., N. S., p. 2.



he had been, he would have been engaged in a fraud, and it is now well settled that in such a case notice of the agent is not imputable to the principal. 1 Am. and Eng. Ency. of Law, 423.

**AGENCY — LIABILITY OF MASTER FOR NEGLIGENCE OF SERVANT APPOINTED BY A SERVANT.** — The driver of a bus, being drunk, was forbidden by the police to drive any more at the time, and ordered from the box. He went inside, and, the conductor acquiescing, induced Veares (a former omnibus conductor) to drive the bus home, and by the negligent driving of Veares plaintiff was injured. It did not appear that the driver and conductor had authority to get another driver in cases of this sort. *Held*, that defendants are liable, affirming the judgment of Chalmers, J. *Gwilliam v. Twist & another*, 11 *The Times Law Rep.* 208 (Q. B. D.).

Mr. Justice Lawrence bases his decision on the fact that defendants acquiesced in the driving of Veares, and that he was authorized by the conductor and driver. Mr. Justice Wright, however, goes further and says, "The law is this: that in cases of sudden emergency, the servant may have authority, within the scope of the employment, to act in good faith, and according to the best of his judgment, for his employer's interest, provided that he violates no express limitation of his authority, and no order of the master applicable to the case, and provided that the act be not plainly unreasonable"; the Judge below may have found such an emergency here, and so the judgment will not be disturbed.

No authority is cited by Mr. Justice Wright for this view, and the question seems to be a novel one. There must exist some authority of this sort, for it is not to be expected that the bus is to be driven up to the side of the road and held there until communication can be had with the proprietors. A still more complicated question would arise if this had been a hack.

See NOTES.

**AGENCY — LIABILITY OF MEMBERS OF A COLLEGE CLASS FOR CLASS BOOK.** — A college class voted at a class meeting to publish a certain book, and elected a member of the class business manager of the publication. *Held*, the members of the class present at the meeting, either voting or assenting to the vote, are personally liable for the expense of publication. The business manager acted within the scope of his employment in contracting with the printer. *Wilcox v. Arnold*, 39 N. E. Rep. 414 (Mass.).

Such contracts are so commonly entered into by college classes and other college organizations, that the case is interesting as determining just what is the liability of members.

**BILLS AND NOTES — UNCERTAINTY IN AMOUNT.** — *Held*, a bill of exchange for the payment of a certain sum "with exchange," is not negotiable. *Culbertson v. Nelson*, 61 N. W. Rep. 854 (Ia.).

The authorities on this point are in great conflict, and are well collected in the opinion, which professes to decide the point on strict principle. It is submitted that exchange, like interest, is incidental; indeed, it is difficult to see how the case of a demand note bearing interest can be distinguished from this case. When a note is sold away from the place of making, the question of exchange is always considered. In *Sperry v. Hoar*, 32 Iowa, 184, it was decided that the addition of an agreement to pay attorney's fees did not affect the negotiability of a note. The court distinguish the cases by saying that in the latter the amount of money due at maturity was not uncertain, because the agreement referred only to the remedy if the note was unpaid. In *Bank v. Laughlin*, 61 N. W. Rep. 473 (S. D.), it has just been decided that such an agreement to pay the expenses of collection rendered an instrument otherwise good in form non-negotiable.

**CARRIERS — ARRIVAL AT DESTINATION — TERMINATION OF LIABILITY AS COMMON CARRIER.** — Plaintiff shipped goods on defendant's road consigned to himself. He did not reside nor had he an agent at the place of consignment, and his residence was unknown to defendant. The car containing the goods arrived at the place of consignment, and the goods were left on the car for forty-eight hours after arrival, when they were stolen from the car. *Held*, in the case of portable packages of valuable merchandise, the liability of a railway company as common carrier does not terminate until the goods are removed from the cars and placed in its freight-room, ready for delivery to the consignee, and the consignee has had a reasonable time thereafter to remove them. To allow the carrier to terminate his liability for such kinds of goods by any less formal and expressive act would be against public policy. *Kirk v. Chicago, St. P., M., & O. Ry. Co.*, 60 N. W. Rep. 1084 (Minn.).

The court take judicial notice of a general custom to deliver this kind of freight from the freight-room, and not from the car. As the goods were not unloaded at all,

and as it did not appear that the carrier made any effort to notify the consignee it would seem that the carrier had not "done all that the law required of him to effect a delivery." *Hutchinson on Carriers*, 2d ed., § 356.

CONSTITUTIONAL LAW — EXTRADITION. — One who, standing in one State, shoots some one in a bordering State, does not thereby "flee from justice" within the United States Constitution, Art. 4. sec. 2, cl. 2. *State v. Hall*, 48 Cent. L. J. 148; 20 S. E. Rep. 729 (N. C.).

See NOTES.

CONSTITUTIONAL LAW — [CANADA] — FEDERAL NEGATIVE ON PROVINCIAL ACTS. — The Manitoba Education Act of 1890, although not unconstitutional under cl. 1, § 22, of the Manitoba Act (Canadian Statutes, 1870, ch. 3; *Winnipeg v. Barrett* [1892], App. Cas. 445), is nevertheless subject to be negated by the Dominion Cabinet under cl. 3 of the same section. *Seemle*, that whether or not the conditions justifying a negative exist is a judicial question. *Brophy v. Attorney General of Manitoba*, 11 *The Times* Law Rep. 198 (Privy Council).

See NOTES.

CONSTITUTIONAL LAW — INTERSTATE COMMERCE — OLEOMARGARINE. — To prevent deception a statute in Massachusetts forbids the manufacture or sale of oleomargarine in color resembling butter. *Held*, that the statute in its application to sales of oleomargarine brought into Massachusetts from other States is not in conflict with the power of Congress to regulate interstate commerce. *Plumley v. Commonwealth*, 15 Sup. Ct. Rep. 154, Fuller, C. J., Field and Brewer, JJ., dissenting. See NOTES, 8 HARVARD LAW REVIEW, 353.

CONSTITUTIONAL LAW — POWER OF JURY IN CRIMINAL CASE. — The jury in a criminal case, although they have the power, have not the right to decide upon questions of law. *Sparf v. United States*, 15 Sup. Ct. Rep. 274.

See NOTES.

CONSTITUTIONAL LAW — SALE OF LIQUOR TO INDIANS. — The code of California makes it a felony to sell intoxicating liquors to any Indian, regardless of his citizenship or tribal relation. *Held*, that the law was general and uniform in its operation, and not in violation of any constitutional rights and immunities to which such Indians as citizens of the United States are entitled. *People v. Bray*, 38 Pac. Rep. 731 (Cal.).

This provision in the California code is in line with those statutes, whose constitutionality has been upheld, forbidding sales of liquors to minors (52 Ind. 486), persons already intoxicated (126 Pa. St. 602), and habitual drunkards. Such legislation is highly desirable, and a proper exercise of the police power. *Black, Intox. Liq. § 42*. It is well known that Indians as a class exercise very little self-restraint, and when drunk are especially dangerous to themselves and others. A court would therefore be slow to regard such a restriction as here imposed unreasonable and arbitrary. The case finds support from the Montana court in *Territory v. Guyot*, 9 Mont. 46, though there the Indian was a member of a tribe and not a citizen. Such statutes as those in California and Montana do not conflict with Congressional legislation upon the same subject. *Black, Intox. Liq., § 427*.

CONSTITUTIONAL LAW — TAXATION — ASSESSMENT. — The General Assembly of South Carolina empowered a city council to assess two thirds of the cost of paving a roadway upon the abutting land according to the frontage on said highway. This was a suit by an abutter to restrain the city council from making the assessment. *Held*, the act authorizing such assessment is opposed to the "law of the land," and is in conflict with the provision in the State Constitution requiring all taxes to be uniform in respect to persons and property. *Mauldin v. City Council of Greenville*, 20 S. E. Rep. 842 (Co. Car.).

While denying the right to make special assessments for improvements upon a public street, the court recognized the right to tax the land abutting for the cost of improvements of sidewalks and sewers, as the latter power was early exercised by the colonial legislature, and thereby became the "law of the land." Such precedents would seem sufficient ground for a contrary decision in the principal case, but the court prefer to be consistent and follow *State v. Charleston*, 12 Rich. Law, 702 (1860), where the right to assess for similar benefits was denied.

In holding the assessment void by bringing it within the constitutional provision requiring uniformity, the court are evidently aware of its unique position and pertinently inquire, "Why may not the people of this Commonwealth adopt a domestic policy at variance with the views of others?" There is no reason, of course, if the Legislature sees fit, and the Constitution does not prevent, but as the case is directly contrary to the almost universal doctrine among the other States, even where similar



constitutional provisions prevail, one may advance the query whether this "domestic policy" is really adopted by the people or by the court. Cooley on Taxation, 2d ed., pp. 623, 634-636. Cooley, Const. Lim., 6th ed., pp. 612, 623, 624.

CONTRACTS — OFFER AND ACCEPTANCE. — Plaintiff wrote to defendant, making an offer definite in its terms, and defendant replied accepting the offer. *Held*, that the letters made a binding contract, although it was understood that a formal agreement should afterwards be drawn up and signed by the parties. *Sanders v. Pottlitzer Bros. Fruit Co.*, 144 N. Y. 209.

See NOTES.

CONTRACTS — OUSTING COURTS OF JURISDICTION — BENEFIT SOCIETIES. — A rule of a benefit society, to which members subscribe when admitted, provided that the executive committee shall have power to pass on all death claims, and that its decision after a hearing shall be binding on the claimant unless an appeal is taken to the highest council of the order, that the decision of the appeal shall be final, and that no suit in law or equity shall be commenced by any member or beneficiary against such council. *Held*, such a provision is not invalid as against public policy. *Fillmore v. Great Camp of Knights of Maccabees et al.*, 61 N. W. Rep. 785 (Mich.).

Unless a different principle applies to provisions of this kind by benefit societies, and provisions as to arbitration in general, the case would seem to be wrong according to the strict English rule and that laid down in Massachusetts. *Reed v. Fire & Marine Ins. Co.*, 138 Mass. 572. And no such difference does exist, but the same rules seem to govern both. Bacon on Benefit Societies and Life Insurance, § 94, and cases cited. This being the case, such a provision as that above, which provided for decision by a private tribunal, not only as to the amount of damages, but also as to whether any action lies, would seem to be bad, at least in Massachusetts, and in England before the Act of 14 Vict. c. 138 was passed, allowing such societies to settle their disputes by their own rules and regulations.

CONTRACTS — SUIT BY A BENEFICIARY. — Defendant promised a corporation to pay within thirty days certain debts owed by them to plaintiff and others, in consideration of which the corporation promised to issue to defendant one share of its stock. *Held*, that plaintiff, on defendant's failure to perform, cannot maintain an action against defendant. *Washburn v. Interstate Investment Co.*, Pac. Rep. 620 (Oregon).

This decision seems entirely sound. Plaintiff being a stranger to the contract has no privity, and can only sue successfully by making out a case which will bring him within some of the exceptions to the rule that strangers to a contract cannot sue on it. He does not show that defendant has assets in his hands which in equity belong to him, nor does he show that he is the sole beneficiary, for the corporation were benefited by the contract they made with defendant, by which their debts were to be paid, and they could have sued and recovered more than nominal damages. Why allow two suits then? The United States Supreme Court lay down these exceptions to the rule that a stranger to a contract cannot sue thereon, in *Nat. Bank v. Grand Lodge*, 98 U. S. 123, where at page 124 they say, "One of them and by far the most frequent one is the case where, under a contract between two persons, assets have come to the promisor's hands or under his control, which in equity belong to a third person. In such a case it is held that the third person may sue in his own name. But then the suit is founded rather on the implied undertaking the law raises from the possession of the assets, than on the express promise. Another exception is where the plaintiff is the beneficiary solely interested in the promise, as where one person contracts with another to pay money or deliver some valuable thing to a third. But where a debt already exists from one person to another, a promise by a third person to pay such debt, being primarily for the benefit of the original debtor, and to relieve him from liability to pay (there being no novation), he has a right of action against the promisor for his own indemnity; and if the original creditor can also sue, the promisor would be liable to two separate actions, and therefore the rule is that the original creditor cannot sue." Some courts recognize more exceptions, and some, as Massachusetts, only the first.

CORPORATIONS — INTEREST OF STOCKHOLDERS IN PROPERTY BELONGING TO A CORPORATION. — Provisions in policies of insurance, that the policies shall be void if the interest of the insured is not the sole and unconditional ownership of the property described in the policies, or if that interest is not truly stated to the companies or in the policies, *held*, a complete defence to actions by the sole stockholders of a corporation, upon policies issued to themselves, as owners, upon property belonging to the corporation. A sole stockholder is not the owner of corporate property, nor is his interest like that of an owner. All he is entitled to is a share in the profits while the corporation exists, and on its dissolution a share in any assets which remain after



the corporation's debts are paid; if the corporation be insolvent when the loss occurs, he loses nothing, since his interest is of no value, while an owner loses the value of his property whether he is insolvent or not. *Syndicate Ins. Co. v. Bohn*, 65 Fed. Rep. 165.

**CORPORATIONS — ULTRA VIRES CONTRACT — RESTITUTION.** — The C. Co. leased its property to the P. Co., including cars, patent rights, and contracts with railroad companies. The lease was executed under an Act which was secured from the legislature of Pennsylvania, and which was supposed by all parties to authorize the action. The P. Co. took possession and carried on the business for fifteen years, when they repudiated the lease, and resisted the payment of rent on the ground that the lease was in excess of the lessor's authority. This contention was finally sustained by the courts. The C. Co. now seeks in equity to obtain restoration of or compensation for the property transferred under the lease, which the P. Co. refuses upon the ground that it was not responsible for the property, because transferred under an unlawful contract. *Held*, the lease was made under a statute, which in the opinion of the parties authorized them to make it. All that can justly be said is that, in view of the decision of the court, the parties misconstrued their authority, and that the lease is consequently *ultra vires*. That the execution of this contract does not involve moral turpitude seems clear, and the P. Co., which had received the property of the C. Co. without right and has repudiated the contract, must account for this property to the C. Co. *Pullman Palace Car Co. v. Central Transp. Co.*, 65 Fed. Rep. 158.

That the ultimate result of this case is sound seems clear. There are one or two points, however, which may be noted. The court decide the case by the application of the rules governing unlawful contracts in general. The denial rests on the fact that the property was transferred under an unlawful contract. "The following propositions respecting such contracts may be affirmed with confidence . . . third, that the courts will interfere to compel restitution of property received under such contract by one who repudiates, except when the contract involves moral turpitude" (p. 161). Now, it is submitted that with regard to illegal contracts in general, there is much conflict of authority on this point. Keener on Quasi Contracts, p. 267, *et seq.* Another proposition which the court lays down in regard to unlawful contracts is, that the courts will not interfere for the relief of either party when they have been executed, and the contract in the principal case is treated generally as executory. Bearing in mind that this was a lease for ninety-nine years, of which fifteen had expired, and also that plaintiff had transferred all its property to the defendant, it would seem that to consider this as an executory contract does not accord very well with the language used in *St. Louis, &c. R. R. Co. v. Terre Haute, &c. R. R.*, 145 U. S. 393, which was a bill in Equity filed by lessor corporation against the lessee to set aside an *ultra vires* lease for nine hundred and ninety-nine years, of which seventeen had elapsed, during which the defendant had operated the road. Mr. Justice Gray in dismissing the bill says, "When the parties are in *pari delicto* and the contract has been fully executed on part of the plaintiff by the conveyance of property, neither a Court of Law nor a Court of Equity will assist the plaintiff to recover back the property conveyed. . . . The contract has been fully executed on the part of plaintiff by the actual transfer of its railroad and franchise to the defendant, and the defendant has held the property and paid the stipulated consideration from time to time for seventeen years. . . ." The court in the principal case dispose of the case just cited by saying that it decides that the court will not set aside an unlawful contract which has been so far executed as to make this inequitable. It is submitted that the case is decided on too broad grounds; that it would have been better to base the decision on the peculiar nature of corporations rather than on the grounds which have been considered, as to the soundness of the decision in its result. See Morawetz on Corporations, § 721; Taylor on Private Corporations, § 314; Spelling on Private Corporations, § 167; Waterman on Corporations, § 161.

**DAMAGES — LIBEL — RETRACTION.** — *Held*, in an action for libel that an offer to plaintiff's attorney to publish any retraction that he might write, made after the commencement of the suit, could not be shown in mitigation of damages. *Turton v. New York Recorder Co.*, 38 Fed. Rep. 1009 (N. Y.).

Such an offer made directly to plaintiff could only show absence of malice, and would be admissible only when the action was for exemplary damages. But as this action was against the proprietor of the newspaper, and not against the writer of the article, it was not for exemplary damages. *Haines v. Schultz*, 50 N. J. Law, 481. The refusal to write such a retraction on the part of plaintiff's attorney did not prevent defendant from publishing a retraction, and would not be an excuse for not doing so. A retraction is not an act in which both parties must join. The court says that evidence of a retraction, published soon after the institution of the suit when the suit was begun without previous notice to the defendant, would be admissible. This is a point on which there is surprisingly little authority, but this is not inconsistent with the New

York rule, holding repetitions after the beginning of the suit inadmissible merely because that would lead to assessing damages twice for the same act. *Daly v. Byrne*, 77 N. Y. 182.

**ELECTRIC RAILWAY — ADDITIONAL SERVITUDE — TELEPHONE COMPANY — RESPECTIVE RIGHTS.** — A telephone company strung wires along the street, under a statute which authorized it so to construct its line, provided the ordinary use of the street was not obstructed. Afterward, a street railway company substituted electricity for horses as a motive power, thereby seriously impairing the telephone service. *Held*, (1) that the railway, operated by the overhead, single trolley system, was within the ordinary use of the street as intended by the statute. (2) That the railway company was liable to the telephone company for expenses incurred in erecting higher poles to prevent the telephone wires conflicting with those of the former company, the railway company having needlessly placed its poles on the side of the street occupied by the telephone company. (3) That the railway company was not liable for the induction caused in the telephone wires by its own stronger current, the existence of the weaker telephone current in the street being viewed as "such obstruction of the street as plaintiff is forbidden to create." (4) That, as the current required for the single-wire system of the telephone caused "no hurtful disturbance of natural electrical conditions," and as the violent and varying currents of the railway did cause such disturbance, whereby the telephone service was impaired by conduction or leakage through the earth, the railway company was liable for the damage thus incurred. Two justices dissent upon the first point, another upon the second, and two others upon the fourth. *Cumberland, &c. Co. v. United Electric Ry. Co.*, 29 S. W. Rep. 104 (Tenn.).

As to the first point, the leading case upon this very modern subject, lays down the rule that the mode of use, and not the motive power, is the criterion as to the existence of an additional servitude. *Taggart v. Newport Ry.*, 16 R. I. 668. The rule has been frequently quoted with approval, though the decision, and several subsequent ones, have seemed to hold that, in law, the ordinary electric trolley road constitutes no added burden to the fee. *Halsey v. Railway*, 47 N. J. Eq. 380; *Railway v. Mills*, 85 Mich. 634. But the text-writers agree that the question is still unsettled, and incline to a contrary opinion. See, in addition to the authorities cited, Elliott on Roads, pp. 559-60, and some significant remarks in a late New Jersey case. *W. J. Ry. v. C. G. & W. Ry.*, 29 Atl. Rep. 423.

The second point turned rather upon a finding of fact than upon a principle of law. The third and fourth points have usually been treated as one; no decision has been found which so clearly distinguishes between the damages arising from induction and conduction, and refuses a recovery for one, while permitting it for the other. The authorities upon this precise point are meagre, the arguments having proceeded upon the analogies to air, light, and water. The majority and dissenting opinions elaborately discuss the cases which have arisen upon these questions, and the decision as a whole forms a notable addition to the learning upon this interesting branch of the law.

**PERSONS — ALIENATION OF AFFECTIONS — WIFE'S RIGHT TO MAINTAIN THE ACTION UNDER MODERN STATUTES.** — Statutes provided in substance that a married woman should have as her separate property all rights in action growing out of the violation of any of her personal rights, and should sue in her own name. *Held*, that a married woman could maintain an action for the alienation of her husband's affections. *Clow v. Chapman*, 28 S. W. Rep. 323 (Mo.).

Whether by the common law a wife had no substantive right to her husband's society and protection, or whether there was such a right, though unenforceable because of the difficulty in procedure, is the point upon which cases of this kind hinge. The older authorities held that the wife had no such right. Cooley on Torts, 227. But the wife certainly had some such right, for in the English Ecclesiastical Courts she could sue for restitution of conjugal rights. Bishop on Marriage, Divorce and Separation, §§ 1357, 1358. Accordingly when statutes have given a married woman a right to sue in her own name, thus removing the difficulty in procedure, there remains no reason why a wife should not maintain this action, and the modern authorities all agree in allowing her to do so. *Haynes v. Nowlin*, 129 Ind. 581; *Bennett v. Bennett*, 116 N. Y. 584.

**PERSONS — HUSBAND AND WIFE — EFFECT OF SEPARATE PROPERTY ACTS ON THE HUSBAND'S RIGHTS IN AN ESTATE IN THE ENTIRETY.** — Where land is granted to a husband and wife they hold as tenants in common or joint tenants of the use during their joint lives, and on a mortgage of the land by the husband and foreclosure thereof, the grantee becomes a tenant in common with the wife during the joint lives of the husband and wife and owner in fee of the whole, if the husband survive the wife. *Hiles v. Fisher*, 39 N. E. Rep. 337 (N. Y.).



It was decided in *Bertles v. Nurnan*, 92 N. Y. 152, that the separate property Acts relating to married women had not done away with estates in the entirety. The principal case decides that, while the nature of the estate is not changed the rights of the husband to the possession and income of the property during the joint lives, which depended not on the nature of the estate, but on the general principal of common law that the husband is entitled to his wife's property, is taken away by the statute, and that the wife is entitled to the possession and usufruct jointly with her husband. It is sometimes held that when the nature of the estate is not changed by the separate property acts, neither husband nor wife can transfer any interest without the consent of the other. *McCurdy v. Canning*, 64 Pa. St. 39.

PROPERTY — APPLICABILITY OF REGISTRY LAWS TO LEASE — RENEWAL CLAUSE — NOTICE. — Mass. Pub. Sts. c. 120, § 4, provide that "a lease for more than seven years from the making thereof" shall not be valid against a *bona fide* purchaser for value without actual notice, unless recorded. An unrecorded lease for five years, providing that the lessee was to have the privilege of renewal "for the further term of five years," was held to be within the statute, so as to give the lessee no right to compel a renewal at the end of the first five years, the land having passed to a *bona fide* purchaser who had no actual notice of the unrecorded instrument. *Toupin v. Peabody*, 39 N. E. Rep. 280 (Mass.).

The case does not call for a decision of the question whether such a lease is wholly void as against the purchaser, or whether it may be good for the first term of less than seven years; and the court is careful not to pass upon it. No case has been found upon this precise point. The court follows Massachusetts authority in holding that the fact that defendant knew that plaintiff was in possession as tenant, did not amount to the actual notice required by the statute. *Lamb v. Pierce*, 113 Mass. 72; *Keith v. Wheeler*, 159 Mass. 161. In *Cunningham v. Pattee*, 99 Mass. 248, it was decided that such knowledge amounted to notice of the nature of the tenant's interest, of the existence of a written lease, and of its contents, including a covenant to renew. The principal case is distinguished upon the ground that in *Cunningham v. Pattee* the two terms aggregated less than seven years, so that the statute had no application. The case is clearly within the purpose of the statute, though these decisions would seem to indicate that knowledge of a fact may amount to notice of the contents of a lease for seven years or less, while not equivalent to the actual notice required for leases of a longer period. The registry laws of the various States are considered in 1 Devlin on Deeds, c. 21, 22.

PROPERTY — CHATTEL MORTGAGE — DELIVERY. — Where a mortgage is delivered to a third person for the benefit of a mortgagee who is ignorant of its existence, his acceptance as of the time of delivery will not be presumed when this will defeat the intervening rights of attaching creditors of the mortgagor. *Kuh et al. v. Garvis et al.*, 28 S. W. Rep. 847 (Mo.); *Ensworth v. King*, 50 Mo. 477, overruled.

The doctrine of the English courts laid down in *Doe d. Garmon v. Knight*, 5 B. & C. 671, and *Xenos v. Wickham*, L. R. 2 H. L. 296, that the question of delivery is wholly one of the intention of the obligor, and that a deed may become binding before the obligee knows of its existence, has received little support in this country when a strict application of the doctrine would affect the intervening rights of creditors. In *Merrills v. Swift*, 18 Conn. 257, the rights of such creditors were subordinated to those of the mortgagee, and the acceptance was said to relate back to the time of delivery. This has not been followed, however, and has been stated to be doubtful law. 1 Jones on Mortgages, § 502. On the other hand, Wisconsin, New York, New Hampshire, Michigan, Indiana, Massachusetts, Texas, Arkansas, and Kentucky have reached a conclusion contrary to *Merrills v. Swift*.

PROPERTY — FIXTURES. — Held, that an arrangement between vendor and vendee of machinery which is to be attached to the realty, that the title shall remain in vendor until payment, is not binding upon a subsequent mortgagee of the realty who has no notice of this arrangement. *Wade v. Donan Brewing Co.*, 38 Pac. Rep. 1009 (Wash.).

This seems clearly sound, and is in accord with *Southbridge Savings Bank v. Exeter Machine Works*, 127 Mass. 542. A contrary decision would work injustice to the mortgagee, who may have relied on these articles as part of the realty in taking the mortgage. A recent decision in Vermont holds conversely that a statute allowing "machinery attached to, or used in a shop, mill, printing office, or factory" to be mortgaged as realty does not apply where the machinery is put in subsequently to the execution of the mortgage. *Kendall v. Hathaway*, 30 Atl. Rep. 859 (Vt.). In such a case the mortgagee would have all he could have relied on without the fixtures. The distinction between these cases is well shown in *Davenport v. Shants*, 53 Vt. 546.

PROPERTY — SEVERANCE FROM THE FREEHOLD BY A TRESPASSER. — A suit brought by a landowner against defendant, an innocent vendee of a trespasser, who



had cut logs from plaintiff's land, came up on exceptions to the Supreme Court of Florida, which laid down the following rule as to assessing damages in cases of this kind, viz.: Where the defendant is an unintentional or mistaken trespasser, or an innocent vendee from such mistaken trespasser, the value at the time and place of its first conversion. *Wright et al. v. Skinner*, 16 So. Rep. 335 (Fla.).

The Florida court hold that an innocent vendee from an innocent trespasser will only be liable for the same damages as the innocent trespasser himself. But it is submitted that this is not sound. The vendee commits a wrong when he purchases the property, which, though out of the possession of the plaintiff, is still owned by him. He is guilty of a conversion at the time of sale and must be liable to plaintiff for the value of the goods at that time. But granting that he stands on the same footing as the trespasser, yet the Florida court is still in error in its ruling. They allow as damages the value at the time of first conversion, which they say is *when the logs are first taken from the plaintiff's land*. They cite a number of decisions to uphold their view. But most of those cases go directly against it, and hold that damages in case of unintentional trespass shall be the value of the trees, or whatever the several chattels may be, *as they stood in the ground*. This is quite different from giving the value when they had been removed from the plaintiff's land and been trimmed and increased in value, as was the case at bar. The Florida court proceed on the basis that a trespasser cannot get possession of the trees till he has taken them off the land owned by the plaintiff. This is not sound, as is shown by the fact that larceny cannot be committed by severing articles from the realty if the act is continuous and no reverting of the articles after severance, when they are chattels and thus subject to larceny, takes place. *Reg. v. Townley*, 12 Cox, C. C. 59. The Florida court must have mistaken the cases which they cite as supporting their view on this point, which is wrong, as well as the first one. *Forsyth v. Wells*, 41 Pa. St. 291, the first of a long line of concurring cases, and 2 Sedg. Dam., 8th ed., § 500 *et seq.*, uphold the view here advanced.

**SALE OF GOODS—PURCHASER FOR VALUE—PRE-EXISTING DEBT.**—The question before the court being whether a naked pre-existing debt is such a consideration or payment for the transfer of goods as will defeat replevin by the original vendor, who sets up fraud in the purchase from him, the Michigan Supreme Court held, *Montgomery & Hooker, JJ.*, dissenting, that it is not such a consideration. *Schloss v. Feltus*, 61 N. W. Rep. 797 (Mich.).

The court say that though one who discharges a pre-existing debt in exchange for a negotiable instrument may be regarded as a purchaser on good consideration, one who does so in exchange for other chattels is not so regarded. Although this seems to be the general authority, one cannot help seeing the justice of the view taken by the dissenting judges. It would seem that their opinion is the correct one on principle, and that no valid distinction can be made between negotiable paper and other chattels. *Work v. Brayton*, 5 Ind. 396; *Frey v. Clifford*, 44 Cal. 335. In New York, one who takes even a negotiable note and gives in exchange a discharge of a pre-existing debt is not regarded as a purchaser for valuable consideration. *Lawrence v. Clark*, 36 N. Y. 128; *Weaver v. Barden*, 49 N. Y. 286.

**SALES—FACTORS ACT, 1889—HIRE AND PURCHASE AGREEMENT.**—Plaintiff let a piano to Sullivan under the ordinary hire and purchase agreement, by which the piano was to become the property of the "hirer" when a certain number of monthly instalments had been paid, but until the full amount was paid it was to remain the property of the "owner"—plaintiff. Before all the instalments were paid, Sullivan sold the piano to defendant, and was convicted of larceny under Statute 24 & 25 Vict. c. 96. By section 100 of this statute it is provided that on conviction the property shall be restored to the owner, and the court before whom the offender is tried shall order restitution, "Provided also that nothing in this section shall apply to the case of any trustee, banker, merchant, attorney, factor, broker, or other agent intrusted with the possession of goods or documents of title to goods," etc. Under this, counsel for prosecution applied for an order of restitution, and it was refused. Plaintiff now brings this action to recover from defendant damages for the conversion. *Held*, that he could not recover; that under the Factors Act title passed to defendant, as the piano was sold him by a person holding it under an agreement to buy; and that although the Factors Act did not in terms repeal the 24th & 25th of Victoria, yet it did in effect as far as this restitution was concerned. *Held* also, that under the Sale of Goods Act of 1893, providing that "where goods *have been stolen* and the offender is prosecuted to conviction, the property reverts to the owner," plaintiff cannot maintain this action; that although this Act of 1893 was capable of the construction claimed by plaintiff—*i. e.* contrary to Factors Act—such was not the proper one when it was borne in mind that this Sale of Goods Act was passed to consolidate the law. "The true way of

dealing with the words 'have been stolen,' was to treat them as subject to the express limitation already created by statute, especially when the reasons for their limitation were so recent." *Payne v. Wilson*, 11 *The Times Law Rep.* 179 (Q. B. D.).

The interesting matter in this case is the way the court construes the various statutes. *Helby v. Matthews*, [1894] 2 Q. B. 262, and *Lee v. Butler*, [1893] 2 Q. B. 318, have already settled that the hire and purchase agreements enabled the "hirer" to pass a good title under the Factors Act. There can be no question but that the Factors Act of 1889 meant to brush aside any previous legislation opposed to its spirit; and as far as that point goes there can be no doubt as to the soundness of this case. Nor, on the whole, can there with reference to the Sale of Goods Act. The reasoning of the court, that this was meant to consolidate the law, and that the policy which produced the Factors Act of 1889 was not meant to be changed by that codification, seems unanswerable.

**TORTS—FALL OF CHIMNEY—RULE OF RESPONSIBILITY OF OWNER.**—In an action to recover compensation for the damage caused by the fall of a mill chimney during a heavy wind, the plaintiff requested the court to charge the jury that the defendant was liable, unless the fall of the chimney was due to inevitable accident, or the wrongful acts of third persons. This charge the court refused to give, but instructed the jury that the defendant was liable only in case he had failed to exercise ordinary care. After verdict for the defendant the plaintiff brought the case up on exceptions, and the court held that though the instructions requested by the plaintiff were not entirely correct, they were sufficiently so to warrant it in sustaining his exceptions to the charge as given. It is thus plainly stated that the correct rule for determining the responsibility of the defendant is expressed neither in the instructions requested by the plaintiff, nor in those given by the court, but what that correct rule is, this court has failed to state in any intelligible form. *Cork et al. v. Blossom et al.*, 38 N. E. Rep. 495 (Mass.).

See NOTES, 8 HARVARD LAW REVIEW, 224.

**TORTS—INFRINGEMENT OF RIGHTS OF PRIVACY.**—*Held*, that where a person has so placed himself before the public that he may be called a public character neither he, nor, after his death, his representative has any right to object to the reproduction of his photographs; but that a private individual, independently of contract, has a right to be protected in the representation of his portrait in any form; it is a property as well as a personal right; and belongs to the class of rights which forbids the reproduction of a private manuscript or painting. *Corliss et al. v. E. W. Walker Co. et al.*, 64 Fed. Rep. 280.

See NOTES, 8 HARVARD LAW REVIEW, 280.

**TORTS—MAINTENANCE.**—Action to recover on an agreement to pay solicitors' costs in a criminal action prosecuted by one H. Defence, that it was illegal as tainted with maintenance. *Held*, that as it was for the public benefit that a person should be entitled to prosecute; maintenance, however morally unjustifiable, was in a criminal action not illegal. *Grant v. Thompson*, 11 *The Times Law Rep.* 207, Wills and Wright, JJ. See next case, and NOTES.

**TORTS—MAINTENANCE.**—The present defendant assisted X. in a libel suit against the present plaintiff, growing out of transactions in which substantially the same libel had been uttered against the present defendant. *Held*, that this came within no recognized exception to the law against maintenance, and that the plaintiff had a cause of action accordingly. *Alabaster et al. v. Harness et al.*, [1895] 1 Q. B. 339. See preceding case and NOTES.

**TORTS—MALICE.**—The posting of a placard headed "Trollope's Black List," giving the names of non-union men employed by the plaintiff, is restrainable by injunction. The cause of action is not libel, but malice. Obiter dictum of Lord Field in *Mogul, &c. Co. v. McGregor et al.*, [1892] Ap. Cas. 51 followed. *Trollope et al. v. London Building Trades Federation*, 11 *The Times Law Rep.* 228. (Kekewich, J., Chan. Div.) See NOTES.

**TORTS—MALICIOUS INTERFERENCE WITH BUSINESS—BOYCOTT.**—The defendant, an association composed of delegates from a number of trades unions, issued circulars calling upon all friends to boycott the plaintiff's newspaper, because the plaintiff determined to use "plate matter" in the make up of his paper, contrary to an interdictive resolution of the Typographical Union, and to cease buying and advertising in the said paper, intimating that whoever did not do so would incur the enmity of organized labor. *Held*, an action will lie for damage caused to plaintiff by loss in circulation and advertising. A malicious injury to another's business by an otherwise lawful act



is actionable, and an act is malicious in point of law if done intentionally and without legal excuse. Injunction granted. *Barr v. Essex Trades Council*, 30 Atl. Rep. 881 (H. J.)

This case adds one more well considered decision to the rapidly increasing number of cases supporting the proposition laid down by Bowen, L. J., in *Mogul Steamship Co. v. McGregor*, L. R. 23 Q. B. D. 598, that an act which causes damage to another, though lawful in itself, may become actionable if done without just cause or excuse. It is to be regretted that so able an opinion as the present, and one that contains such an exhaustive review of the cases in support of the decision, does not deal with any of the mass of authorities the other way. *Heywood v. Tillson*, 75 Me. 225; *Payne v. Ry. Co.*, 13 Lea, 507; *Boyson v. Thorn*, 33 Pac. Rep. 492; *Chutfield v. Wilson*, 28 Vt. 49; *Mahan v. Brown*, 13 Wend. 261; *Phelps v. Nowlen*, 72 N. Y. 39. Such cases as these are all within Lord Bowen's broad rule. There are, however, the possible distinctions, that in the principal case the boycott involved threats or intimidation, thus bringing the case within the principle of *Tarleton v. M'Gawley*, Peake, 205, and that an act, though not actionable when done by an individual, may become so when done by a combination conspiring together. *Curran v. Galen*, 22 N. Y. Supp. 826. But see *Dela v. Winfree*, 80 Tex. 400. A glance at the cases shows that the question is very far from being solved, but the present case reaches the result that is to be desired. 7 HARVARD LAW REVIEW, 180; 21 American Law Review, 509, 764.

**TORTS — TRESPASS — INEVITABLE ACCIDENT.** — Where the defendant's cab-driver, without negligence, tries to turn down a side street, on account of a break in the harness at the brink of a steep descent, and the horse runs into the plaintiff's shop window, it is held that trespass will not lie, since the act was neither negligent nor voluntary on the part of the driver. *Peacock v. Nicholson*, 11 The Times Law Rep. 225 (Q. B. D.).

This affirms the decision in *Stanley v. Powell*, [1891] 1 Q. B. 86, and seems perfectly sound. The court distinguish the case of negligence and that of intentionally inflicting one injury for the purpose of avoiding another, and, since no blame at all is attached to the accident, allow no recovery for it.

**TRADE MARK — FANCY WORD "MAZAWATTEE."** — Application to strike off the register certain trade marks consisting of or combining the word "Mazawattee" on the ground that it was a descriptive word, inasmuch as the last part, "watee," meant in Cingalese an estate, and the first part, "Maza," meant relish in the Hindu language, and that taken together the word conveyed the impression that the tea sold under this name came from Ceylon. Held, In England this word was meaningless. To Hindus it was also meaningless, because they could not understand the last part, nor was it intelligible to the Cingalese, for they could not understand the first part. The word therefore had no meaning in any known language, and could not be called descriptive. *In Re Densham & Sons' Trade Mark*, 11 The Times Law Rep. 184 (Chan. Div., Romer, J.).

The court intimates that the decisions have gone too far in holding certain words to be descriptive, and especially throws doubt on the soundness of the decision in *In Re Jackson's Trade Mark*, 6 Rep. Pat. Cas. 81, which held that the word "Kokoko" was not allowed to be registered because the word in the language of the Chippeway Indians meant an owl, and, as an owl is a common mark on certain Manchester goods, it was held that the word was not a good "fancy" word, inasmuch as it was not known how long it might not be before there was a trade with these Indians in Manchester goods, in which case these goods might be confused with those marked "Kokoko." Romer, J., in the principal case, says that under the peculiar circumstances he would have left the Chippeway Indians to take care of themselves. See on this point Browne on Trade Marks, 2d ed., §§ 33, 547.



## REVIEWS.

COMMENTARIES ON THE LAW OF INSURANCE. By Charles Fiske Beach, Jr. Boston and New York: Houghton, Mifflin & Co. 1895. 2 vols. pp. cxxviii. 606, xx. 944.

In works on Insurance it is customary for authors to discuss the authorities freely, and to present their own views. From this custom, founded perhaps in the fact that this branch of law is of comparatively recent development and has been consciously affected by the views of merchants and of Continental jurists, these volumes by Mr. Beach depart as widely as possible. His text is largely composed of full extracts from recent judicial opinions, reprinted without comment. Even when he states propositions of law in his own language, he gives no discussion. An author thus modestly effacing himself — not attempting to trace the growth and modification of doctrine, not explaining the reasons underlying the law, and refraining from criticising and comparing decisions — appears to make a mistake when he entitles his volumes "Commentaries"; but the quotation marks enclosing the greater part of Mr. Beach's text frankly and accurately describe his work, and thus make it impossible to base a hostile criticism upon the misnomer.

From what has been said it is obvious that these volumes cannot serve as the student's introduction to Insurance, or as the practitioner's most valuable source of knowledge, but that persons already thoroughly acquainted with the history and principles of Insurance and with the famous leading cases may find here an easy method of supplementing their knowledge by reading liberal extracts from recent opinions.

E. W.

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HANDBOOK OF AMERICAN CONSTITUTIONAL LAW. By Henry Campbell Black, M. A. St. Paul, Minn., West Publishing Co., 1895. pp. xxiv. 627. (Hornbook Series.)

This book has decided merit. The author is frequently dogmatic concerning points upon which one would be inclined to differ with him. For instance, he says that "the construction of a system of sewers . . . in a city . . . is not a public purpose as regards the people of the State at large." To one writing in Massachusetts, the reasonable language of the Supreme Court here upon this very point instantly occurs. "Everything is a public use," say they, "which tends to enlarge the resources, increase the industrial energies, and promote the productive power of any considerable number of the inhabitants of a section of the State." *Talbot v. Hudson*, 16 Gray, 417, cited in *Kingman et al., Pet'r's*, 153 Mass. 566, as the ground of the decision in the latter case in favor of State aid to a metropolitan sewerage system. That a large part of such a handbook should be dogmatic in order to brevity will be admitted by every one; but students of the branch of constitutional law which involves this question of what is a public use, and, it may be added, students also of the question as to what is a taking of property, are entitled, even in the briefest handbook, to learn that there are two schools upon such important questions, — and Mr. Black does not supply that information. And so\* it is of one or two other moot points. For instance, the view of the minority in the *Slaughter-House Cases* on the meaning of the word liberty

is nowhere stated. And yet, considering its following in State courts, it represents a tendency important enough to deserve notice, even in a handbook. An Illinois student is entitled to know that a statute requiring a flagman at a crossing will be held to deprive the railway company of liberty, however objectionable the reasoning. Mr. Black gives a reference to one New York case in a foot-note, and that is all.

When one turns, however, from this somewhat summary disposal of important questions, the dogmatism becomes of the greatest importance and merit, and makes the body of the book most satisfactory, so that it ought to be of great service to any one studying or reviewing constitutional law. The neat and accurate language in which the contention that statutes may be bad as against mere public policy or natural justice is disposed of, the terse comment on the Dartmouth College Case, the treatment of the question of the implied powers of the Federal Government, are a few instances among many possible ones which will show to any one who looks over the book that it is a really good elementary student's work except for the one fault discussed above. R. W. H.

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AMERICAN PROBATE LAW AND PRACTICE. By Frank S. Rice. Albany: Matthew Bender. 1894. 8vo. pp. l. 786.

The style of text-book, of which this work of Mr. Rice as well as his former ones on Evidence are very good types, seems to be on the increase. A digest is a very useful article to have at one's elbow, but we are apt to desire something more when we turn to the text-book. A full and complete discussion of authorities, of course, must precede or follow any dealing with a matter theoretically, but one does like the author's own idea somewhere. It would seem to be much wiser to give us a few thoughts on the subjects which we could not find by glancing through authorities in general, than to increase the size of the volume (as well as of the price) by infinite quotation and repetition. The law of supply and demand governs in most matters, however, and there must exist a demand for books of this character or they would not increase. They seem to be very popular, as we are informed in the Preface of this work that "the very flattering reception accorded to the author's former efforts" makes him hopeful of the success of this.

The author has succeeded, however, in giving us what appears to be a very good collection of authorities on a subject that seems to have been neglected. It is rather peculiar that no one has undertaken this task before, but as a whole it is said to be untouched. The book purports to deal with the "general principles governing the execution and proof of wills, the devolution of property, the administration of estates, and the relations subsisting between guardian and ward," and covers these matters quite thoroughly. The selection of authorities is a very wise one. At page 54 he deduces from *Barry v. Bullin*—or rather quotes from Baron Parke—the principle that the *onus probandi* lies on the party producing the will and rests on him all the way through; at page 275, from *Re Phené's Trust*, the principle that although after seven years a man is presumed to be dead, there is no presumption as to the time of his death. (This statement is then repeated, in the form of quotations, three times on this page.) Examples might be noted at length, but they will hardly make the book and its style plainer. In a word, it is a book which could have told us as much in a few hundred pages less just as well, and saved our



eyes and temper, but which has collected most of the cases on the various subjects in a sensible manner; and, so far as has been noticed it does cite the cases for what they represent.

J. S. S., JR.

CASES ON CONSTITUTIONAL LAW. By James Bradley Thayer, Weld Professor of Law in Harvard University. Part IV. Cambridge: Charles W. Sever. 1895. pp. xviii. 987 (1433-2420).

This part contains Ch. VIII., Ex Post Facto and Retroactive Laws (100 pp.); Ch. IX., Laws impairing the Obligation of Contracts (249 pp.); Ch. X., The Regulation of Commerce (410 pp.); Ch. XI., Money, &c. (82 pp.); and Ch. XII., War, &c. (228 pp.). It completes the whole in four parts and 2,420 pages, which will in future be divided for convenience into two volumes, the dividing line coming in the middle of what is now Part III., at p. 1189, between Eminent Domain and Taxation. There is a good index, and a preface worth reading.

A comparison naturally suggests itself between this collection of cases and parts of cases and the similarly constructed law-books which are called by their authors text-books and treatises. Here one has the meat of the cases, garnished with much sound sense and comment furnished by the editor; there one has long abstracts from the cases, furnished by a person who in his preface in one breath condemns himself to be dumb, and in the next calls himself the "author." The comparison is decidedly to the advantage of the editor. No one would care to make up his mind upon any branch of a subject like Evidence, Insurance, or Constitutional Law merely from reading a selection of abstracts called a text-book. Here one knows and sees what one is getting, and can trust to it.

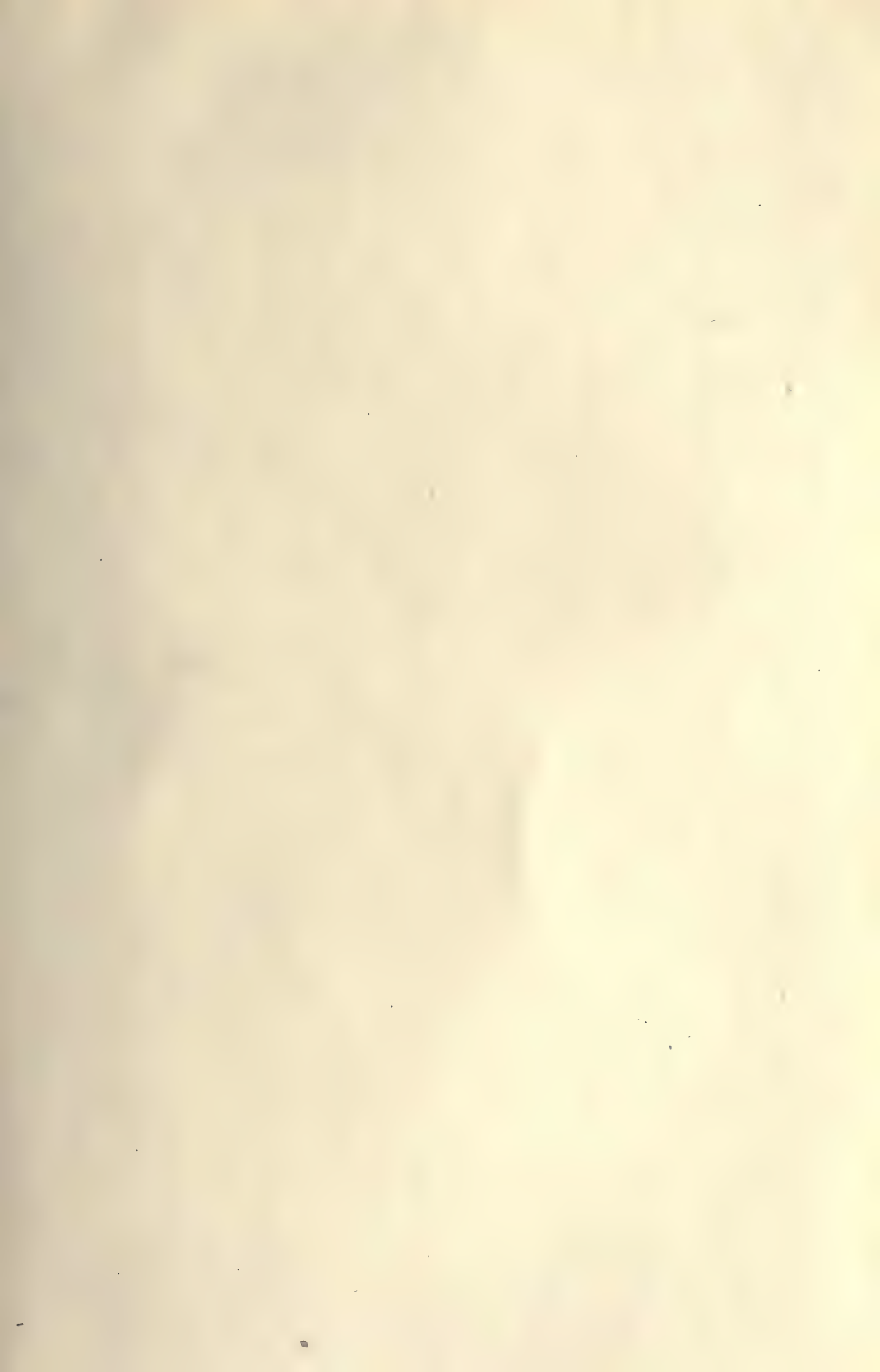
R. W. H.

HANDBOOK OF EQUITY JURISPRUDENCE. By Norman Fetter. St. Paul: West Publishing Co. 1894. (Hornbook Series.)

To write an admirable treatise on Equity Jurisprudence within the space of a few hundred pages would require an amount of knowledge and skill that could hardly be attained in any other way than by an original and laborious analysis of the very sources of that system of law. In the present work the author has attempted no such ambitious task, but has endeavored to state clearly, and in the most convenient and attractive form, the principles of his subject as they are generally understood. With this aim in view, the leading books on the topic have been freely consulted and greatly relied on as guides, in many cases to advantage, in a few with less valuable results. The subject of misrepresentation, for example, as distinct from mistake on the one hand (*Redgrave v. Hurd*, 20 Ch. D. 1, 2), and fraud on the other (*Newbigging v. Adam*, 34 Ch. D. 582, *Peek v. Derry*, 14 App. Cas. 347, *Anson on Contracts*, (6th ed.), 154, *Holland, Juris.* (6th ed.) 237), has, as usual, not been given its proper due. This and similar mistakes, however, are perhaps not fair tests by which to estimate the value of the work, considering the limited purposes it aims to fulfil. On the whole, the book is a good one, and contains in little space such a concise and succinct statement of generally accepted theories as can hardly fail to recommend it to students in search of handy and not uninteresting summary of equity jurisprudence.

D. A. E.













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